CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 182.

THE PENNSYLVANIA LUMBERMEN'S MUTUAL FIRE INSURANCE COMPANY

vs.

CHARLES C. MEYER.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 27, 1904.

(19,219.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 13, 1904.

1 United States Circuit Court of Appeals for the Second Circuit.

THE PENNSYLVANIA LUMBERMEN'S MUTUAL FIRE INSURANCE Company, Plaintiff in Error,
v.
CHARLES C. MEYER, Defendant in Error.

This cause comes here upon a writ of error to review a judgment of the circuit court for the western district of New York upon a decision of that court rendered, after a trial without a jury, in favor of the defendant in error, who was plaintiff below.

Upon examination of the record it appears that in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the circuit court is in issue. Under sections 5 and 6 of the act of March 3, 1891, writs of error in such cases are to be taken direct to the supreme court, and the grant of appellate jurisdiction to circuit courts of appeal does not include such cases. This court therefore reserves judgment upon the other questions, and certifies the question of jurisdiction to the Supreme Court.

2 *Statement of Facts.*

The facts out of which the matter of jurisdiction arises are as follows:

The defendant in error, a citizen of the State of New York, recovered judgment herein against the plaintiff in error, a citizen of the State of Pennsylvania, for five thousand three hundred fourteen dollars and ninety-eight cents ($5,314.98) damages and costs for destruction by fire of buildings in Rochester, N. Y., insured by the plaintiff in error.

The action was commenced in the supreme court of the State of New York, by service of the summons on Samuel H. Beach, at the city of Rome, N. Y., a director of the company, who resided in that city, and on application of the company, appearing specially, was removed into the circuit court because of diverse citizenship of the parties. By motion, on special appearance, to set aside the service, by plea, exception and assignment of error, the question as to whether jurisdiction of the company had been obtained by such service has been properly raised.

The defendant in error is, and at the time of the commencement of this action was, a citizen and resident of the State of New York. The plaintiff in error is a fire insurance corporation organized under the laws of the State of Pennsylvania, and its office is in Philadelphia. Written applications were duly made to it for the

issuance of the policies in suit, and were mailed from Roche
3 ter, N. Y. to the company at Philadelphia, Pennsylvan
The policies were made out and executed by it at Phil
delphia and were sent to the insured at Rochester, N. Y., where
received the same. All transactions between the company and sa
insured, subsequent to the issuance of said policies and until aft
the destruction of said property by fire were by correspondence,
writing, from Philadelphia to him at Rochester, and he writi
from Rochester to it in Philadelphia.

Three of the said company's thirteen directors reside in the Sta
of New York, but the only act done by them for it is to attend fro
time to time the meetings of its board of directors which are he
in the city of Philadelphia, and there to give such advice and ta
such action in connection with its business as may seem to the
proper. They perform no duties and do no acts for the company i
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or officers within that State and has not had at any time. It has
office within that State, has never been authorized or licensed b
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Ever since the plaintiff in error was incorporated it has been en
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ing in the company, the conversation being had at the city o
Rochester, in said State.

Question Certified.

Upon the facts set forth above the question of law concerning which this court desires the instruction of the Supreme Court is:

"Had the circuit court jurisdiction of the plaintiff in error?"

In accordance with the provision of section 6 of the act
5 of March 31, 1891, establishing the courts of appeal, the foregoing question of law is by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

Dated January 19th, 1904.

E. HENRY LACOMBE,
Circuit Judge.
WM. K. TOWNSEND,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.

6 UNITED STATES OF AMERICA, }
Southern District of New York. }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate was filed and entered of record in my office on the 19th day of January, 1904, and as directed by the judges of said court said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

New York, January 19th, 1904.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

7 [Endorsed:] United States circuit court of appeals, second circuit. The Pennsylvania Lumbermen's Mutual Fire Insurance Co. plaintiff in error, *v.* Charles C. Meyer, defendant in error. Certificate to Supreme Court. United States circuit court of appeals second circuit. Filed Jan. 19 1904 William Parkin, clerk.

Endorsed on cover: File No. 19,219. U. S. C. C. of appeals, 2nd circuit. Term No. 182. The Pennsylvania Lumbermen's Mutual Fire Insurance Company *vs.* Charles C. Meyer. (Certificate.) Filed January 27", 1904. File No. 19,219.

(19,219.)

IN THE SUPREME COURT OF THE UNITED STATES.

No. 182, October Term, 1904.

Pennsylvania Lumbermen's Mutual Fire Insurance Co.
vs.
Charles C. Meyer.

Stipulation as to Policies in Suit.

It is hereby stipulated that the policies of insurance on which suit was brought were all in the same form, and that the terms and conditions of these policies are correctly set out in the copy of one of these policies in printed record of the above case in the circuit court of appeals for the second circuit, and that the court may consider and decide this case with the same effect as if in the statement of facts accompanying the question certified by said United States circuit court of appeals for the second circuit the said court had found and certified the additional fact that the policies of insurance sued upon were in the form and language of the policy set out in said record in said United States circuit court of appeals.

Washington, March 15, 1904.

FRANK P. PRICHARD,
Att'y for Penna. Lumb. Mut. F. I. Co.

Herman W. Morris HENEAULT & MODES,
Att'y for Charles C. Meyer, Def't in Error.

[Endorsed :] File No. 19,219. Supreme Court U. S., October term, 1904. Term No. 182. The Pennsylvania Lumbermen's Mutual Fire Insurance Co. *vs.* Charles C. Meyer. Stipulation of counsel as to policies of insurance. Filed March 15th, 1905.

FILE COPY.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1904. No. 182.

The Pennsylvania Lumbermen's Mutual Fire Insurance Company

vs.

Charles C. Meyer.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The suit was an action at law in the United States Circuit Court for the Western District of New York, brought by Charles C. Meyer against the Pennsylvania Lumbermen's Mutual Fire Insurance Company, upon a policy of fire insurance, to recover the amount of a fire loss. There was a trial without a jury, and under a decision of the court judgment was rendered in favor of plaintiff and against the insurance company for the sum of $5314.98. A writ of error was taken to the United States Circuit Court of Appeals for the Second Circuit, where, in addition to certain questions as to the merits of the con-

troversy, it appeared that the jurisdiction of the United States Circuit Court was in issue. The United States Circuit Court of Appeals, therefore, reserved judgment upon the other questions and certified the question of jurisdiction to the Supreme Court of the United States. (Record, page 1.)

The question certified is as follows:—

> "Had the Circuit Court jurisdiction of the plain-
> "tiff in error?" (Record, page 3.)

The facts certified by the court upon which the question of jurisdiction depends are as follows (Record, page 1):—

> "The defendant in error, a citizen of the State of
> "New York, recovered judgment herein against the
> "plaintiff in error, a citizen of the State of Pennsyl-
> "vania, for five thousand three hundred and four-
> "teen dollars and ninety-eight cents ($5314.98) dam-
> "ages and costs for destruction by fire of buildings
> "in Rochester, N. Y., insured by the plaintiff in
> "error.
>
> "The action was commenced in the Supreme
> "Court of the State of New York by service of the
> "summons on Samuel H. Beach at the city of Rome,
> "N. Y., a director of the company, who resided in
> "that city, and on application of the company ap-
> "pearing specially, was removed into the Circuit
> "Court because of diverse citizenship of the parties.
> "By motion, on special appearance, to set aside the
> "service, by plea, exception and assignment of error,
> "the question as to whether jurisdiction of the com-
> "pany had been obtained by such service has been
> "properly raised.
>
> "The defendant in error is, and at the time of
> "the commencement of this action was, a citizen and
> "resident of the State of New York. The plaintiff
> "in error is a fire insurance corporation organized
> "under the laws of the State of Pennsylvania and
> "its office is in Philadelphia. Written applications
> "were duly made to it for the issuance of the policies
> "in suit and were mailed from Rochester, N. Y., to
> "the company at Philadelphia, Pa. The policies

"were made out and executed by it at Philadelphia "and were sent to the insured at Rochester, N. Y., "where he received the same. All transactions be- "tween the company and said insured, subsequent "to the issuance of said policies and until after the "destruction of said property by fire, were by cor- "respondence in writing from Philadelphia to him "at Rochester, and he writing from Rochester to it "in Philadelphia.

"Three of the said company's thirteen directors "reside in the State of New York, but the only act "done by them for it is to attend from time to time "the meetings of its board of directors, which are "held in the city of Philadelphia, and there to give "such advice and take such action in connection "with its business as may seem to them proper. "They perform no duties and do no acts for the "company in the State of New York, and never "have. The company has no agents or officers "within that State and has not had at any time. "It has no office within that State, has never been "authorized or licensed by the insurance depart- "ment thereof to do business therein, and has not "taken the steps required by law for that purpose. "At the date of the service of the summons as "aforesaid the said company had and now has "about nine hundred thousand dollars ($900,000) "outstanding insurance on property within the "State of New York, which is something less than "one-third of its total risks. The applications there- "for were made by mail addressed to it at Philadel- "phia and the policies were executed and issued at "that city and sent by mail from there to the in- "sured within the State of New York.

"Ever since the plaintiff in error was incorporated "it has been engaged in the business of insuring "property located in the State of New York and "other States against loss by fire and has sent by mail "circulars from Philadelphia into said State solicit- "ing business. In the prosecution of its business "and for the purpose of increasing it, the company "sends its general manager to the different con- "ventions of lumbermen held in the State of New

"York for the purpose of urging upon those attend-
"ing upon such conventions the advantages of in-
"suring with it. It sends its adjusters into the
"State of New York when a loss by fire occurs there
"to property insured by it, for the purpose of ad-
"justing the amount of such loss. It originally
"placed insurance upon the property covered by
"the policies in question after its manager had
"pointed out the advantage of insuring in the com-
"pany, the conversation being had at the city of
"Rochester, in said State."

ARGUMENT.

In order to give a Federal court jurisdiction in a suit against a corporation foreign to the State within whose borders the suit is brought, two facts must be shown, viz. :—

First.—That the foreign corporation is carrying on business within the State.

Second.—That the corporation is properly brought into court by service upon an officer or agent who can fairly be said to be its representative agent within the State.

Both of these conditions must be shown. It is not sufficient merely to show that the foreign corporation is carrying on business within the State. It must also appear that it has been properly served.

This rule does not in any way conflict with the doctrine that a State may prohibit either absolutely or conditionally a foreign insurance company from carrying on business within the State, and may either expressly or impliedly require as one of the conditions of the license that the corporation shall consent that a certain designated agent or a certain designated officer of the State shall be the representative of the company to receive service of writs.

The mere fact, however, that a State may prohibit the foreign corporation or may impose conditions does not give the Federal courts jurisdiction in suits against such a corporation, unless the corporation is constructively within the State borders by carrying on business there and unless it is brought into court by a summons served upon its agent or officer representing it in the State.

These principles have been authoritatively settled by this court.

In the case of—

St. Clair *vs.* Cox, 106 U. S., 350,

the record of a judgment obtained in Michigan against a corporation of another State was offered in evidence in another suit to support a setoff. It appeared that the laws of Michigan authorized service upon a foreign corporation by delivering a copy of the writ to "any officer, "member, clerk or agent of such corporation." It appeared from the record that the writ was returned as served by delivering a copy within the State of Michigan to Colwell, agent of defendant. It did not appear affirmatively in the record that the corporation was carrying on business in Michigan. This court held that the record was properly excluded, saying (Mr. Justice Field delivering the opinion):—

> "Without considering whether authorizing service "of a copy of a writ of attachment as a summons on "some of the persons named in the statute—a mem- "ber, for instance of the foreign corporation, that is "a mere stockholder—is not a departure from the "principle of natural justice mentioned in Lafayette "Insurance Co. *vs.* French, which forbids condemna- "tion without citation, it is sufficient to observe that "we are of opinion that when service is made within "the State upon an agent of a foreign corporation, it "is essential, in order to support the jurisdiction of "the court to render a personal judgment, that it "should appear somewhere in the record, either in "the application for the writ, or accompanying its

"service, or in the pleadings or the findings of the "court, that the corporation was engaged in business "in the State. The transaction of business by the cor- "poration in the State, general or special, appearing, "a certificate of service by the proper officer or a per- "son who is its agent there would, in our opinion, "be sufficient *prima facie* evidence that the agent "represented the company in the business. It would "then be open, when the record is offered as evidence "in another State, to show that the agent stood in "no representative character to the company, that "his duties were limited to those of a subordinate "employee or to a particular transaction or that his "agency had ceased when the matter in suit arose.

"In the record, a copy of which was offered in "evidence in this case, there was nothing to show, "so far as we can see, that the Winthrop Mining Com- "pany was engaged in business in the State when "service was made on Colwell. The return of the "officer, on which alone reliance was placed to sus- "tain the jurisdiction of the State court, gave no in- "formation on the subject. It did not, therefore, "appear even *prima facie* that Colwell stood in any "such representative character to the company as "would justify the service of a copy of the writ on "him. The certificate of the sheriff, in the absence "of this fact in the record, was insufficient to give "the court jurisdiction to render a personal judg- "ment against the foreign corporation. The record "was therefore properly excluded."

In the later case of

Connecticut Mutual Life Ins. Co. *vs.* Spratley, 172 U. S., 602,

the defendant was a Connecticut corporation which from 1870 to 1894 carried on a life insurance business in the State of Tennessee through agents who transacted the business in Tennessee. In 1875 the Legislature of Tennessee passed a statute requiring foreign insurance companies to file with the Insurance Commissioner a power of attorney, authorizing the Secretary of State to acknowledge service of process for the company at all times

thereafter, even though the insurance company might subsequently have retired from or been excluded from the State. In pursuance of this Act the Connecticut corporation filed such power of attorney and never subsequently revoked it. In 1887 the Legislature of Tennessee passed another statute, which provided that foreign corporations doing business in the State should be subject to suit there to the same extent as domestic corporations so far as related to transactions within the State or causes of action arising therein; and further, that any corporation that had any transactions with persons or concerning any property situated in the State through any agency whatever acting for it within the State, should be held to be doing business therein. In 1889 the Connecticut corporation insured, through an agent who came into the State, the life of one Spratley. In 1894 the Connecticut corporation ceased to issue new policies in Tennessee; withdrew its agents from the State and notified the Insurance Commissioner to that effect. It continued, however, to receive premiums on the policies then in existence in Tennessee, through a former agent for that State, who resided in Kentucky, and settled claims on the policies as they fell due. In 1896 Spratley died, and the Connecticut corporation sent into Tennessee an agent to investigate and adjust the claim. This agent had been in the service of the company for special service in any matters which might be referred to him. He was, while in Tennessee, authorized to compromise the claim on the Spratley policy upon certain terms. The compromise not having been made, suit was brought upon the policy in Tennessee and the writ served on this agent, who had been conducting the negotiations. The company then filed a bill in a State court to enjoin the proceedings. The Supreme Court of the State refused relief, and this court sustained the decree, on the ground, first, that the withdrawal of its agents and refusal to issue new policies within the State was not a discontinuance of its business as to the existing policies procured in the State, and as to which it continued to collect the premiums through

its former agent; and, second, that the agent on whom the service was made could fairly be considered a representative agent for the transaction of its business within the State, and therefore amenable to service.

In the course of the opinion (delivered by Mr. Justice Peckham) the rule governing such cases is again concisely and clearly stated, as follows:—

> "In a suit where no property of a corporation is "within the State and the judgment sought is a per- "sonal one, it is a material inquiry to ascertain "whether the foreign corporation is engaged in doing "business within the State (Goldey *vs.* Morning News, "156 U. S., 519; Merchants' Mfg. Co. *vs.* Grand "Trunk Ry. Co., 13 Fed. Rep., 358), and if so the "service of process must be upon some agent so far "representing the corporation in the State that he "may properly be held in law an agent to receive "such process in behalf of the corporation."

It will be observed that in one of these cases the jurisdiction was denied; in the other it was affirmed; but in both cases the statement of the principles determining the result was the same. In both cases it was affirmed that in order to sustain the jurisdiction the corporation must be doing business within the State, and the service must be made upon an agent or officer who could fairly be said to be the representative of the corporation in the business there conducted.

The present case, therefore, must necessarily turn upon the inquiries:—

First.—Whether the Pennsylvania Lumbermen's Mutual Fire Insurance Company was doing business in New York.

Second.—Whether service on a director who did no business for the corporation in New York, but who happened to reside there, was a service on the corporation.

It is submitted that both these questions must be answered in the negative.

AS TO THE QUESTION WHETHER THE CORPORATION WAS DOING BUSINESS IN NEW YORK.

The findings by the court below expressly negative most of the facts which are usually relied on in such cases to prove that the foreign corporation is doing business within the State.

It is expressly found that the company has no agents or officers within the State of New York, and has not had at any time; that the company has no office in the State, has not been licensed to do business therein, and has taken no steps to obtain such license; that all its applications for insurance, including the one for the policy in suit, were made to it by mail addressed to its home office in Pennsylvania, and that the policies were executed and issued there and then mailed to the insured. It is found that while three of its directors reside in New York, they perform no duties and do no acts for the company in New York, and never have, and that their sole duty is to attend meetings in Pennsylvania and there give advice. There is no finding that the company ever sent into the State any officer or agent authorized to solicit or receive applications for insurance or to receive or make payments or to carry on in any way any branch of the company's business.

Standing alone these findings would conclusively establish that the company was not doing business in New York. It remains only to consider how far this conclusion is affected by certain other facts found by the court below.

These facts will be found to be substantially four in number, viz.:—

1. Three of the company's directors reside in the State of New York, although they perform no duties and do no acts for the company in that State.

2. Something less than one-third of the contracts of insurance made in Pennsylvania by the company relate to property situated in the State of New York.

3. When there occurs a loss by fire in New York which is covered by one of the company's policies, it sends adjusters to New York for the purpose of adjusting the amount of the loss.

4. It sends by mail circulars into New York soliciting business, and it sends its manager to conventions of lumbermen held in New York for the purpose of pointing out the advantages of insuring with it, but not, so far as appears, for the purpose of soliciting or receiving applications.

These facts will be considered *seriatim*.

AS TO THE RESIDENCE OF THE DIRECTORS.

That the residence in a State of directors of a foreign corporation does not give the corporation a domicile in the State or constitute the carrying on of business there has been conclusively settled by the decision of this court in

Conley *vs.* Mathieson Alkali Works, 190 U. S., 406.

In that case two of the directors of a Virginia corporation resided in New York, and service was made upon them in a suit against the corporation. This court affirmed an order setting aside the service. In the opinion (delivered by Mr. Justice McKenna) it is said:—

> "The residence of an officer of a corporation does "not necessarily give the corporation a domicile in "the State. He must be there officially—there rep- "resenting the corporation in its business."

As to the Issuing of Policies Against Loss by Fire of Properties Situated in New York.

The business of the defendant corporation was strictly that of fire insurance. It made contracts in Pennsylvania by which it undertook to pay in Pennsylvania a sum of money, not exceeding a specified limit, upon proofs delivered in Pennsylvania by the insured showing that he had sustained pecuniary loss by the destruction of or injury to his property by fire.

This business did not involve any possession of or work upon the property itself, nor the taking of title to the property, either absolutely or in pledge. It was purely a business of making contracts to pay money upon the presentation of proofs of pecuniary loss.

All these contracts were made in Pennsylvania. No applications were solicited or received in New York, no premiums were paid there, no losses paid there. In fact, the company had no office or agents in New York, either temporary or permanent, who were authorized either to solicit or receive applications or deliver policies or make payments.

Under these circumstances it is submitted that the Pennsylvania corporation could not be said to be carrying on business in New York merely because its contracts made in Pennsylvania and to be performed in Pennsylvania related to an indemnity against loss by fire to property in New York.

To hold that because business carried on in the home State of a corporation relates to persons or property in another State, therefore the corporation is engaged in doing business in that other State, although the contracts do not involve possession of or title to or acts done upon the property, would be to announce a novel doctrine, the results of which would be wide reaching and embarrassing.

A few examples may serve to illustrate this. If an accident insurance company issued accident policies in its own State, and in any year one-third of the losses arose

from accidents occurring in another State, would the insurance company be held to be doing business in that other State?

If a credit insurance company issuing policies in its own State happened to have one-third of its losses due to failures in another State, would the company be held to be doing business in that other State?

If the majority of the guests of a hotel keeper in New York were citizens of New Jersey, would the hotel keeper be held to be doing business in New Jersey?

If a publishing house in New York published a biographical dictionary of the leading citizens of Connecticut, or a work descriptive of the most beautiful buildings in Connecticut, would it be held to be doing business in Connecticut?

If a New York banker had for his principal business in any year the underwriting and sale of railway bonds secured by mortgages of railroads in Pennsylvania, would the banker be said to be doing business in Pennsylvania?

Such examples might be multiplied indefinitely.

It is not contended that the making and performance of such contracts might not be accompanied by the doing of business in the foreign State. The business might be of such a character as to necessarily involve possession of or title to or work upon property in the foreign State, or the corporation might for its own convenience voluntarily send its agents into the foreign State to solicit or execute or perform its contracts. What is now contended is that the mere fact that the contracts made in the home State relate to property or persons in the foreign State does not make the execution and performance of such contracts the doing of business in such foreign State.

In the case of

Allgeyer *vs.* Louisiana, 165 U. S. Reports, 578, a statute of Louisiana had prohibited any person from doing any act to effect insurance on property in the State in any marine insurance company which had not com-

plied with the laws of the State. The defendant made a contract with the Atlantic Mutual Insurance Company, a corporation of New York, for an open policy of marine insurance of $200,000, and subsequently mailed from New Orleans to the company in New York a communication stating that insurance was wanted on a certain risk under the open policy. The judgment having been given against the defendant, an appeal was taken to this court, which reversed the judgment. In the course of the opinion, delivered by Mr. Justice Peckham, it was said:—

> "The Atlantic Mutual Insurance Company of New "York has done no business of insurance within the "State of Louisiana and has not subjected itself to "any provisions of the statute in question. It "had the right to enter into a contract in New York "with citizens of Louisiana for the purpose of in- "suring the property of its citizens, even if that "property were in the State of Louisiana, and "correlatively the citizens of Louisiana had the "right without the State of entering into contract "with an insurance company for the same purpose. "Any act of the State Legislature which should pre- "vent the entering into such a contract, or the "mailing within the State of Louisiana of such a "notification as is mentioned in this case, is an im- "proper and illegal interference with the conduct "of the citizen, although residing in Louisiana, in "his right to contract and to carry out the terms "of a contract validly entered into outside and be- "yond the jurisdiction of the State."

The court also, in the course of the opinion, said:—

> "The mere fact that a citizen may be within the "limits of a particular State does not prevent his "making a contract outside its limits while he him- "self remains within it."

In the case of

United States *vs.* American Bell Telephone Co., 29 Fed. Rep., 17.

referred to in the opinion in

Connecticut Mut. Life Ins. Co. *vs.* Spratley, 172 U. S., 602.

already cited, the American Bell Telephone Company, a corporation of the State of Massachusetts, furnished the telephone instruments and the right to operate them to companies in other States. In one of those other States suit was brought against it and service attempted. Jackson, J., delivering the opinion, said:—

> "Without undertaking to review the authorities "on the subject of a corporation's liability to suit "in a State or district other than that of its creation, "we think the decisions of the Supreme Court have "settled and established the proposition that, in "the absence of a voluntary appearance, three con- "ditions must concur or co-exist in order to give the "Federal courts jurisdiction *in personam* over a "corporation created without the territorial limits "of the State in which the court is held, viz.: (1) "it must appear as a matter of fact that the corpo- "ration is carrying on its business in such foreign "State or district; (2) that such business is trans- "acted or managed by some agent or officer appointed "by and representing the corporation in such State; "and (3) the existence of some local law making "such corporation, or foreign corporations generally, "amenable to suit there as a condition, express or "implied, of doing business in the State. * * *
>
> "It cannot be held sufficient to give this court "jurisdiction *in personam* over a foreign corpora- "tion that it has property rights, however exten- "sive, within the district, or that it has pecuniary "interests, however valuable, in business managed "and conducted by others. It must itself be carry- "ing on business in its own right, on its own re- "sponsibility, and for its own account, and through "or by means of its own agents, officers or repre- "sentatives, in order to bring it within the operation "of the laws of a State other than that in which it "is incorporated, making it amenable to suit there "as a condition of its doing business in such State."

In the case of

Marine Ins. Co. *vs.* St. Louis, &c., S. Ry. Co., 41 Fed. Rep., 643,

an insurance company, which, by reason of having paid a

loss by fire, had been subrogated to the rights of the insured, brought an action against the railway company for the destruction of the goods. There was a defense that the plaintiff was an insurance company which had not complied with the laws of the State regarding insurance companies doing business within its borders. The court said:—

> "Another defense relied on is that the plaintiff "is a foreign corporation that had not complied "with the laws of this State at the time of the issue "of its policies. This defense is based on the Act "approved April 4th, 1887 (Acts Ark., 1887, page "234), which provides 'that, before any foreign "'corporation shall carry on any business in this "'State,' it shall file a certificate in the office of the "Secretary of State, designating an agent, a citizen "of this State, upon whom service of process may "be made, and that in default thereof the contracts "of such foreign corporations with citizens of this "State shall be void. There is no force, however, "in this defense, since the evidence shows that the "contracts of insurance were made in the State of "New York, and that the policies were issued in "that State. As was said by Gresham, J., in Lamb "*vs.* Bowser, 7 Biss., 315, it is hardly competent "for the legislature of this State 'to declare that "'the citizens of this State shall not be allowed to "'make such contracts as they please, out of the "'State, for the insurance of their property, whether "'it be within or without the State.' Certainly it "was not the intention of the legislature to go so "far; and the court so held in that case, where the "statute was the same, in substance, as our own. "Certainly the issuing of a policy in New York, on "property here, cannot be considered as the carrying on of business in this State, within the intent "and meaning of the statute in question."

In the case of

Sullivan *vs.* Sheehan, 89 Fed. Rep., 247,

the question arose whether loans made by an Illinois as-

sociation to residents of Minnesota, constituted the doing of business in the latter State. The court said:—

> "I apprehend that the penalties which are denounced by statute against these companies in case they do business with residents of this State, apply only to cases where such business is done within the State. Such a statute cannot possibly have an extraterritorial effect, so as to prevent a company of that kind, located in Chicago, from transacting business lawfully with a resident of Minnesota who should go to Chicago and transact the business there. There is nothing in that statute that would prevent such a resident of Minnesota from going to Chicago, and there applying and subscribing for and acquiring stock of an association of this kind, and there obtaining, if he could, a loan from a corporation of this kind. I think there is nothing in this statute preventing him from there giving security upon property situated in Minnesota, to secure such a loan. The prohibition is aimed at such companies as, by their officers or agents, come into the State of Minnesota—within the territorial limits of the State—to solicit and transact business; and cannot affect business which they perform outside of the State, where they have a right to transact business merely because such business is transacted with a resident of the State of Minnesota."

The decisions of the State courts, including the State of New York, are in harmony with this construction of the law.

In the case of

Hyde *vs.* Goodnow, 3 Comstock (N. Y.), 266,

a mutual fire insurance company had an agent residing in the State of Ohio, authorized to receive applications for insurance. The agent received from a resident of Ohio an application and premium note, and transmitted them to the office of a New York insurance company, in the State of New York. They were received, passed upon and approved, and a policy was transmitted to the appli-

cant by mail. The agent had no authority to make insurances. Suit was brought in New York upon a premium note, and defense was set up that by the laws of Ohio the contract was void, being an insurance effected in that State by a foreign company, contrary to its statutes. The court said:—

> "The applications of the defendant for insurance "could in no sense have been regarded as a contract "until they had been accepted by the company. "The agent did not assume to do anything which "would bind the company. His office was to re- "ceive, and submit to the company, the defendant's "propositions. Until the company acted upon "such propositions, it was within the defendant's "power at any time to recall them. Before the "company had agreed to insure, the defendant, "notwithstanding the execution and delivery of "the notes and applications to the agent of the "company, might have withdrawn his applications, "and upon his doing so, his notes would have been "inoperative. Until then, the transactions were "wanting in that mutuality which is essential to a "valid contract. But when the company having "received the applications, accompanied with the "notes, consented to insure, and issued its policies, "what was before revocable became irrevocable. "What was before a mere proposition, then became "invested with the attributes of a contract, and "from that time each party became bound for its "performance. If this be so, the contracts are to "be regarded as having been made when the com- "pany received and accepted the defendant's ap- "plication and issued and transmitted to him their "policies. Of course, they were contracts made in "the State of New York, and not in Ohio. The in- "surance was not effected in Ohio, nor were the "policies 'signed, issued or delivered' there. The "case, therefore, is not within the prohibitions of "the statute."

In the case of

Huntley *vs.* Merrill, 32 Barbour, 626,

a New York insurance company had insured property in

Pennsylvania belonging to a Pennsylvania citizen. The negotiations for the insurance were made in Pennsylvania by an agent of the New York insurance company, who was authorized by the company to make surveys and receive applications, but he had no power to ratify or approve the applications, or to issue policies, or to make contracts of insurance. The applications were approved by the company in New York, the policy issued in New York and mailed to the insured in Pennsylvania. Suit was brought in New York upon a premium note, and the defense was that by certain statutes of Pennsylvania it was provided that no corporation of any foreign State should be insurers within the State against loss by fire upon any property within the State, but that a mutual fire insurance company chartered in an adjoining State might have an agency or agencies and become insurers. The court, while deciding the case on another ground, said:—

> "I am inclined to think that Hyde *vs.* Goodnow "(3 Comst., 266), disposes of the second question. "In this case, as in that, the contract was made at "the office of the company in this State. In that "case the statute declared 'No policy of insurance "'of any description, or for any purpose, shall be "'signed, issued or delivered in this State, nor on "'any property of any kind situated in this State, "'by any association, company or corporation not "'chartered by the laws of this State, except,' &c., "and the statute made null and void all policies, "&c., made contrary to its provisions. The case "was not within the exception contained in the "statute. The plaintiff was permitted to recover, "as the contract was made in this State."

In the recent case of—

Cummer Lumber Co. *vs.* Associated M. F. Ins. Co., 67 App. Div., 151,

affirmed without opinion by the Court of Errors and Appeals of New York in—

Cummer Lumber Co. *vs.* Associated M. F. Ins. Co., 173 N. Y, 633.

a manufacturing corporation of Florida employed an agent within the State of New York to solicit orders and to make estimates. This agent had an office, and was paid by a commission. The orders were sent from New York to the plaintiff in Florida, where they were accepted, and the bills and goods sent directly from Florida to the customers. A suit was brought in New York by the Florida corporation, and the defendant set up that it was doing business in New York, without a certificate, contrary to the New York statute, which provided that no foreign stock corporation doing business in the State should maintain any action on any contract made in the State until it had such a certificate. It was held that the corporation was not doing business within the State. The court said:—

> "The plaintiff's agent was no more than a traveling salesman, with permanent headquarters in the city of New York, and the evidence clearly shows that he maintained, not an office of the plaintiff, but an office for his own use and he did business in this State for the plaintiff only in the sense that every traveling salesman for an individual or a corporation having a domicile or place of business outside of this State, does business for his employer by soliciting orders to be approved and accepted at the home office."

In the case of—

Seamans *vs.* The Knapp-Stout Co., 89 Wis., 171, an insurance company of Wisconsin issued and mailed policies on properties in the States of Iowa and Missouri, but had not complied with the insurance laws of those States. It was claimed that by the laws of those States the policies were void. The court said:—

> "But each of the contracts for the insurance of such property against loss by fire was a mere contract for indemnity in case of loss. Darrell *vs.* Tibbitts, 5 Q. B. Div., 560; Stanhilber *vs.* Mut. M. Ins. Co., 76 Wis., 291. Although it related to the loss of such property, yet it in no way attached to or affected the title to such property. *Ibid.* Such being

"the nature of the contracts sued upon and the "residence of the two corporations, there would "seem to be no good reason why they could not, "within the State of Wisconsin, make valid con- "tracts for indemnity against loss by fire of such "properties, notwithstanding the same were located "in such other States."

In the case of—

Clay F. & M. Ins. Co. *vs.* Huron, &c., Co., 31 Mich., 346,

where the defense was that a foreign insurance company had issued policies in Michigan without complying with the laws of that State, the court said:—

"In regard to the first of these, it is sufficient to "say, without looking further, or seeking other "grounds, that the contract of insurance here pur- "ported to have been made in another State, and "that the defense explicitly assumed such to be the "fact. The contract was personal and not real, "and although it had relation in a certain sense to "realty, it was not operative upon the estate, but "merely as an agreement to pay money in case the "erections, or other property specified, should be "damaged by fire. The circumstance that the "liability to pay was made to depend upon an "event to real property here, did not make the con- "tract a Michigan contract, or in any legal sense "make this State the place of performance by the "insurance company. And the further circum- "stance that the contractee was a Michigan cor- "poration, did not impress upon the contract the "quality of locality, so as to cause our laws in "regard to business done here by agents of foreign "companies to affect it in point of law."

In the cases of—

City of New Orleans *vs.* Rhenish, &c., Lloyds, 31 La. Ann., 781;

State *vs.* Williams, 46 La. Ann., 922,

the question arose as to the operation of the State insurance laws on foreign companies issuing policies directly from

their respective domiciles, and the court held that such companies were not obliged to take a license. In the last-named case the court said:—

> "We have decided that a foreign insurance com-
> "pany which issues policies directly from its domicile,
> "who has no agent here and who only agrees to
> "accept risks placed for them by a person residing
> "here, cannot be compelled to pay a license."

In the cases in which this court has sustained findings that a foreign corporation was doing business in a State, the decision has always rested on the fact that the business was being actually conducted in the State by agents of the corporation, and not on the fact that the contracts related to property within the State.

Thus, in the case of—

> Connecticut Mut. Life Ins. Co. *vs.* Spratley, 172 U. S., 602,

already cited, the Connecticut corporation had entered into a contract of life insurance with a citizen of Tennessee, through the solicitation of an agent sent by it into Tennessee for that purpose. At that time the corporation was admittedly carrying on business in the State, and had complied with the State statutes prescribing the requisites for a license to so carry on business. Subsequently the corporation withdrew it agents from Tennessee, but continued to collect the premiums on the policy through the former agent, who resided in Kentucky, and on the death of the insured, it sent its agent into Tennessee to negotiate and compromise with the beneficiary. Suit was brought in Tennesee and the writ served on this agent. The jurisdiction was sustained on the ground that the contract had been solicited and procured by an agent in Tennessee; that the mere withdrawal of its agents by the company, while continuing to collect the premiums on such policies, was not a discontinuance of this business, and that the agent sent to compromise the claim was a representative agent engaged in such business in the State.

The case of—

Chattanooga Nat. B. & L. Assn. *vs.* Denson, 189 U. S., 408,

was ruled on substantially the same grounds. In that case the Tennessee corporation, through an agent in Alabama, had made loans in that State secured by mortgages on Alabama property. The contract was procured and the papers delivered through an agent in Alabama, although the note evidencing the loan purported to be dated and payable in Tennessee. The corporation had paid the license fee required by Alabama from foreign corporations and supposed that it was carrying on business in that State in compliance with the State law, although in point of fact it had not complied with all of the requirements of that law. It was held that the business was really transacted through the agent in Alabama, and was intentionally so done, the corporation supposing that it was rightfully carrying on business within the State.

In both these cases the business was actually carried on in the State by agents sent there for that purpose, and this business related to the solicitation or delivery or performance in the State of the contract. In the present case neither the contract in suit nor any other contract was solicited, executed, delivered, or performed, either partially or wholly, by any agent within the State. It never applied for a license to do business in New York and never sent any agent into New York who was authorized to do business for it there. It is submitted that the mere fact that it issued policies of insurance in Pennsylvania against losses on New York property did not constitute the doing of business in New York.

As to the Sending of Adjusters into New York to Adjust the Amount of Loss.

There is nothing in the record to show that these adjusters had any authority to deal on behalf of the company with persons in the State of New York. There is nothing to show that they were other than mere appraisers sent to estimate the value of the goods and the amount of the loss

and report to the company. Even if they had been authorized to settle and compromise the claim with the insured, this would not have amounted to a doing of business in New York by the corporation, but would have been a mere settlement of liability under business contracts made and to be performed elsewhere.

It might be that if it appeared from other facts that the corporation was actually doing business in the State, service might be made upon an agent sent into the State with general powers to settle and compromise a liability arising in the course of that business. If, however, the corporation is not otherwise doing business in the State, the sending of an agent to appraise or inspect or examine the facts with regard to a claim against it, or even to compromise or settle such a claim, could not constitute the doing of business if the business in the course of which the claim arose was actually carried on outside of the State. Otherwise a corporation purchasing by mail orders lumber in a foreign State might be held to be carrying on business in a foreign State because it was in the habit of sending its inspectors to agree with inspectors of the vendors as to the count and quality of the lumber as it was loaded or because it was in the habit of settling disputes by arbitrators, mutually chosen, who met in the foreign State. Or it might be held that a corporation was doing business in a foreign State because it was in the habit of sending its attorney into that foreign State to settle claims of citizens of that State arising in the course of business carried on exclusively in its home State.

It is not necessary, however, to discuss this question further, since, as has been already pointed out, there is no finding that the adjusters sent into New York by the Pennsylvania corporation to adjust the amounts of losses under its policies had any powers to represent the company in dealings with others or to do anything but measure or adjust and report to the company the amounts of such losses.

In the case of—

Sullivan *vs.* Sheehan, 89 Fed. Rep., 247,

already cited, it was contended that the Chicago company which made loans to Minnesota residents, was doing busi-

ness in Minnesota, because its officers came to Minnesota to inspect the property. The court said:—

"The evidence shows that at some time Marston "and some other officers of the Chicago company "came here, and that they did look over this prop- "erty; but it does not appear that while here they "solicited or obtained any application for member- "ship, or made, negotiated or promised any loan. "I do not think their merely coming here and look- "ing over the property for the purpose of satisfying "themselves as to its value, in case it had been or "should be offered as security for the business "transacted in Chicago, comes within the inhibi- "tion of the statute, or renders, or tends to ren- "der, the contracts that were afterwards made, "Minnesota contracts."

In the case of—

People *vs.* Gilbert, 44 Hun. (N. Y.), 522,

the court said:—

"The defendant demurred, on the ground that the "complaint did not state facts sufficient to consti- "tute a cause of action, and his demurrer was sus- "tained at Special Term. This decision was right, "unless the adjustment of a loss is 'transacting the "'business of fire or inland navigation insurance,' "within the meaning of the statute. We do not "think these words were used with the intent to "prevent the fire insurance companies of other "States or foreign countries from employing agents "to take the necessary steps to pay their debts here. "The complaint speaks of the subject of the adjust- "ment as 'a certain loss or indebtedness.' A liability "has accrued against the Pennsylvania corporation "arising out of insurance on New York property. "There is nothing to show that the contract of in- "surance was not made under such circumstances as "to be perfectly legal. The policy may have been "issued in Pennsylvania to citizens of that State "on property situated in New York. If lawfully "issued there, the insurers would be liable here.

"(Hope Mutual Life Ins. Co. *vs.* Perkins, 38 N. Y., "404, 408.) Being under obligation, therefore, to "pay something, the company employed an agent "to ascertain how much it ought to pay, by investi- "gating the extent of the loss in the locality where "it occurred. It does not seem to us that the statu- "tory prohibition was aimed at such acts as this. "The purpose of the statute is an important con- "sideration in passing upon the question presented "here. It was designed to afford our own citizens "security in dealing with the fire insurance com- "panies of other States and foreign countries, which "were allowed to be represented in this State by "agents who effected insurance in their behalf. "Foreign insurance corporations were not to be "permitted to come here into our own territory "and solicit business and take risks unless they "would submit to certain conditions imposed for "the benefit of those who might deal with them. "If they make legal contracts elsewhere, however, "relating to property in this State, it is not an ad- "vantage, but an injury to the New York prop- "erty owner to prohibit them from fulfilling such "contracts here. Indeed there might be some "question how far the power of the legislature ex- "tends in this direction. So that if we consider "the evident object sought to be attained by the "statute, it would seem that the adjustment of a "loss and indebtedness is not within the purview "of the prohibition, which was intended, not as a "protection to New York insurance companies "against outside competition, but as a safeguard "to those seeking insurance in outside companies "represented within the State."

In the case of—

French *vs.* The People, 6 Col. App., 311,

a statute prohibited any one from delivering policies or adjusting losses or aiding in the transaction of insurance business with unlicensed companies. The defendant was an adjuster sent to appraise the loss, but without authority to agree with the insured. The court said:—

"I can see no good legal reason why an insurance "company owing a debt to a citizen should be any "more restricted in its right to send an agent to "ascertain the amount, preparatory to payment "than any other debtor. Any construction of the "statute that would have that effect would violate "public policy and fundamental law and be void."

AS TO THE SOLICITATION OF BUSINESS BY MAIL CIRCULARS AND THE ADVERTISING OF THE MERITS OF THE COMPANY BY ITS MANAGER WHILE ATTENDING CONVENTIONS.

It appears by the finding of facts that the Pennsylvania corporation sent mail circulars into the State of New York, but it is not found or intimated that these mail circulars suggested that the business thus solicited could be done with the company in the State of New York or through any agent there. In like manner it is found that the manager of the company while attending conventions in New York State "urged upon those attending upon "such conventions the advantage of insuring with it;" but it is not found or intimated that the manager offered to receive or did receive applications, or that he suggested that the insurance could be effected elsewhere than at the office of the company in Pennsylvania, or that communications could be received or forwarded through any agency in New York.

It is submitted, therefore, that the findings on this point, so far from showing that the Pennsylvania company was doing business in New York, show conclusively that it was not doing business there, but was endeavoring to persuade citizens of New York and other States to come to Pennsylvania, either in person or by mail, and transact business with the company there.

It would be a novel doctrine that because a corporation advertises by means of mail circulars sent to citizens of New York or by means of advertisements in New York papers, it is thereby doing business in the State of New York. Of course, if the advertisement requests or sug-

gests that the business may be transacted through an agent of the company in New York, it might be some evidence that the company is doing business there, but if it suggests no other way of doing business with the corporation than sending in person or by mail to its office in its own State, it is not only no evidence of the transaction of business in New York, but very persuasive evidence that there is no agency in New York, and that the company does not transact any of its business there. It would seem to be equally true that the mere fact that the manager attends conventions in New York for the purpose of advertising the merits of his company and urging others to do business with it is no evidence that the company is doing business in New York State unless it be suggested that the business can be done in whole or in part in New York or through or with the assistance of an agent there.

In the case of

Carpenter *vs.* Westinghouse Air-Brake Co., 32 Fed. Rep., 434,

the defendant corporation had, within the State, a train of cars, its personal property, to which was attached the brake which it manufactures and sells, which train of cars and brake were exhibited and used simply for the purpose of exhibition. They were not run for the purpose of carrying freight or passengers, but simply for advertisement. The opinion of the court was delivered by Mr. Justice Brewer, then Judge of the Circuit Court, and in the course of it he said:—

> "It is not pretended that the train of cars was "run for any purpose of carrying freight or passen- "gers. The defendant did not engage in the busi- "ness of transportation. It was showing its prop- "erty. It appears affirmatively that it did not make "any contracts for the sale of this brake, so that all "that can be said is that it was having its prop- "erty in this State on exhibition, and for that pur- "pose only. Does the fact that the chief officers of

"the corporation come into the State with some of "its property for advertisement and exhibition bring "that corporation into the State as an inhabitant, "or so that it can be said to be found within the "State within the Act of Congress? * * *

"Suppose there was a corporation in Illinois en- "gaged in the breeding and selling of Norman horses, "and it should send one of the principal officers to "this State to attend the various county fairs with "some of its fine animals. In one sense it is carry- "ing on a business; that is, it is engaged in adver- "tising; but can it be said it is engaged in the busi- "ness for which it is incorporated? Can it be said "to have established an office or agency in this State "for the carrying on of that business? If we say "that the mere matter of advertising a business is the "introduction of that business in the State, it would "follow that every corporation located elsewhere that "should send its circulars into the State, send news- "papers with its advertisement, would be engaged "in its business in that State, and to be found there "for purposes of suit."

Nothing can be added to this illustration. It is conclusive on the subject.

While each fact found by the court has been discussed separately, they are no stronger in support of the jurisdiction if considered together. Practically they amount to a finding that the Pennsylvania corporation carried on its business wholly in Pennsylvania, and not through any agency in New York; that it desired and sought to obtain as customers citizens of New York, and did have a large number of such customers, but that it declined to deal with them in New York and invited them always to come either in person or by mail to Pennsylvania, where alone it carried on its business with them, received all applications and payments, delivered all contracts and made all payments.

Under these circumstances it is submitted that the company cannot be held to have been carrying on business in New York.

If the Pennsylvania Lumbermen's Mutual Fire Insurance Company was not carrying on business in the State of New York, that fact is conclusive against the jurisdiction, since the case in then on all fours with the case of

Conley *vs.* Mathieson Alkali Works, 190 U. S., 406, in which service upon a resident director of such a corporation was held not to give jurisdiction.

If, however, the court should hold that the company was carrying on business in New York, then the further question arises, Was the corporation properly brought into court by service upon its representative officer or agent?

The record does not set out the New York statutes with regard to service on foreign corporations, but as this court will take judicial notice of such statutes, attention is called to them. They provide as follows:—

CODE OF CIVIL PROCEDURE.

"SECTION 1780. When Foreign Corporations may "be Sued.

"An action against a foreign corporation may be "maintained by a resident of the State, or by a "domestic corporation, for any cause of action. An "action against a foreign corporation may be main- "tained by another foreign corporation, or by a "non-resident, in one of the following cases only:—

"(1.) Where the action is brought to recover "damages for the breach of a contract made within "the State, or relating to property situated within "the State at the time of the making thereof.

"(2.) Where it is brought to recover real property "situated within the State, or a chattel, which is "replevied within the State.

"(3.) Where the cause of action arose within the "State, except where the object of the action is to "affect the title to real property situated without "the State.

"SECTION 432 (amended 1877, chapter 416). How "Personal Service of Summons Made upon a Foreign "Corporation.

"Personal service of a summons upon a defend- "ant, being a foreign corporation, must be made "by delivering a copy thereof within the State, as "follows:—

"(1.) To the president, treasurer or secretary; or, if "the corporation lacks either of those officers, to "the officer performing corresponding functions "under another name.

"(2.) To a person designated for the purpose by a "writing, under the seal of the corporation, and "the signature of its president, vice-president or "other acting head, accompanied with the written "consent of the person designated, and filed in the "office of the Secretary of State. The designation "must specify a place, within the State, as the office "or residence of the person designated; and, if it "is within a city, the street, and street number, "if any, or other suitable designation of the par- "ticular locality. It remains in force until the fil- "ing in the same office of a written revocation thereof, "or of the consent, executed in like manner; but the "person designated may, from time to time, change "the place specified as his office or residence, to "some other place within the State, by a writing, "executed by him, and filed in like manner. The "Secretary of State may require the execution of "any instrument, specified in this section, to be "authenticated as he deems proper, and he may "refuse to file it without such an authentication. "An exemplified copy of a designation so filed, ac- "companied with a certificate that it has not been "revoked, is presumptive evidence of the execution "thereof, and conclusive evidence of the authority "of the officer executing it.

"(3.) If such a designation is not in force, or if "neither the person designated nor an officer speci- "fied in subdivision first of this section, can be "found with due diligence, and the corporation has "property within the State, or the cause of action "arose therein; to the cashier, a director or a manag- "ing agent of the corporation, within the State."

It will be observed that under these provisions service is only authorized on a director of a foreign corporation where neither the designated agent of the corporation nor certain other enumerated officers can be found, and either the corporation has property within the State or the cause of action arose therein.

It appears from the record that the company had no designated agent in New York. It does not expressly appear that the other enumerated officers could not be found, but perhaps this is a fair inference from the finding that "the company has no agents or officers within that "State, and has not had at any time." There is no finding that the company has any property within the State. The question, therefore, is narrowed to two matters, viz.:—

1. Did the cause of action arise within the State?

2. Was a service on a resident director who had no duties and performed no acts within the State of New York a valid service?

DID THE CAUSE OF ACTION ARISE WITHIN THE STATE?

If the action had been in tort, for negligently setting fire to plaintiff's premises, the cause of action would have been the fire, or rather the act of the defendant in New York in causing it. The action, however, was in contract, upon the written policy of insurance. The terms of the policy are not found by the court, but the general nature of policies of fire insurance is well known. It has been held, that unlike policies of life insurance, which are contracts to pay a definite sum upon a certain event, they are contracts of indemnity. The obligation is not ordinarily to pay a definite sum in case there is a fire, but to indemnify within certain limits a loss which the insured shall prove to have been incurred from fire. The cause of action was therefore the alleged breach by the insurance company of its contract, or in other words, its refusal to pay at the

place and time, and upon the conditions stipulated by its policy or written contract. It appears by the finding of the court that all the defendant's policies were executed in Pennsylvania and delivered there by deposit in the mail, and presumptively, the proofs of loss were to be furnished in Pennsylvania and the payments made there, since it affirmatively appears that the company maintained no office or agents within the State of New York. At all events the burden was on the plaintiff to justify the source by showing the jurisdictional facts. How, then, can it, with any justice or accuracy, be said that the cause of action, in the present case, arose in the State of New York? The cause, as has been said, was not the fire. It was the failure of the company to make payments in Pennsylvania when the proofs of loss were delivered to it there. A very simple test of this will be found by reference to the case of a statute of limitations. Such a statute usually runs from the time when the cause of action accrues, and the cause of action has always been held to accrue at the time when the plaintiff has an immediate right to bring his action. Such a statute cannot run from the date of the fire, because the mere occurrence of the fire did not make the policy payable. It would run from the time when, under the terms of the policy, the company failed to pay the amount due, at the place where, under the contract it was payable. This breach, however, occurred not in New York, but in Pennsylvania.

It is submitted, therefore, that the cause of action did not arise in New York and that the service was not justified even by the New York statute.

WAS THE SERVICE OF A RESIDENT DIRECTOR WHO HAD NO DUTIES AND PERFORMED NO ACTS IN THE STATE FOR THE CORPORATION, A SUFFICIENT SERVICE?

If the court, in accordance with the argument already made, should be of opinion that the cause of action did not arise in the State of New York, then the service was clearly bad, under the New York statute. If, however,

the court should be of opinion that the cause of action did arise within the State of New York, then a question arises whether the statute is to be so interpreted as to allow service on any person who is a director, or only upon a person who is a director having duties to perform in the State of New York.

It is submitted that the object of the New York statute was to authorize service upon certain representative agents or officers of a foreign company in the State of New York, when the general officers of the company could not be found there. It might and probably would happen that in the case of a foreign corporation doing business in New York, the president, treasurer or secretary would not be found in that State, but that the business would be transacted either by a cashier, a director or a managing agent in that State. A service on either of the last-named officers or agents would be due service, since these officers would be the real representatives in the State of its business, and it is the fair interpretation of the statute to hold that it meant that the service might be made upon a person who, as cashier, director or agent, was carrying on the business of the corporation therein. Certainly, in the case of a cashier, or an agent, the statute would not be held to cover a service upon one who was cashier or agent only for another State, but who happened to be found in or reside in New York.

In the case of—

St. Clair *vs.* Cox, 106 U. S., 350,

the Supreme Court of Michigan had held that an Act authorizing service on any officer or agent of the corporation, only applied to an officer or agent who was representing the corporation in the State, and did not apply to an officer or agent who had no business duties in the State and was simply found there, and this interpretation was adopted and approved by this court. The Michigan Supreme Court, in language quoted by this court, said:—

> "Admitting, therefore, for the purpose of this "suit, that in given cases the foreign corporation

"would be bound by service on its treasurer in "Michigan, this could only be so when the treasurer, "*the then official, the officer then in a manner im-* "*personating the company, should be served.* Joseph "Price was not here as the treasurer of the defend- "ants. He did not then represent them. His act "in coming was not the act of the company, nor was "his remaining the business or act of any besides "himself. He had no principal and he was not an "agent. He had no official *status* or representative "character in this State."

If this interpretation be adopted for the New York statute, then there was no service in the present case upon a director of the corporation, since it is found as a fact by the court below that the director had no duties whatever in the State of New York, and transacted no business for the company there.

It may be said that the Court of Errors and Appeals of New York in the case of

Pope *vs.* Terre Haute Car Co., 87 N. Y., 137,

decided that service upon the president of a foreign corporation who was temporarily within the State was a good service, and that this amounts to an interpretation of the statute that the officer served need not at the time be engaged in business of the corporation. The question in the present case, however, is a different one. The statute divides into two classes the persons on whom service can be made. It can be made in the first instance on the president, secretary or treasurer. If these parties cannot be found in the jurisdiction and the cause of action arose therein, service can be made on "the "cashier, director or a managing agent of the corporation "within the State." There can ordinarily be only one president, one secretary and one treasurer, and therefore no question could arise as to what kind of a president, secretary or treasurer was meant. There could, however, be various cashiers, directors or agents, and the statute therefore might well mean individuals who within the State were exercising the duties of such offices. For example,

a corporation might have a cashier in its local office in each State, but it would scarcely be contended that service in New York upon a cashier in a New Jersey office who was temporarily in New York on personal business would be good. So also a managing agent for New Jersey might reside in New York, yet the statute certainly did not contemplate service on such a managing agent. This very point arose in

Schmidlaff *vs.* La Confiance Ins. Co., 71 Ga., 246,

where the Georgia statute authorized service on an agent, and service was attempted on an agent for the company for the States of South Carolina and Florida, who happened to reside in Georgia. It was held that the service was bad. At first blush it might seem that a director did not belong in the same class as the cashier or agent, but the resemblance is nearer than at first appears. Directors as individuals do not represent the company, and are not, unless specially authorized, the agents of the company. The universal rule on this point is well stated in

Clark & Marshall on Private Corporations, section 690,

as follows:—

> "As was shown in a former section, the directors "or trustees of a corporation are vested with its "management, not as individuals, but as a board, "and as a general rule they can act so as to bind "the corporation only when they act as a board "and at a legal meeting.
>
> "It follows that the directors or trustees of a "corporation are not individually the agents of the "corporation and have no power individually to "bind it by any contract or other transaction."

Individual directors may, however, be authorized by the by-laws to perform certain duties, and it is not unusual for corporations to have resident directors in different States who are authorized to transact in those States certain business for the corporation. Such direct-

ors would naturally be put in the same class as cashiers and managing agents, and presumably the framers of the New York statute meant in so classifying them to include only directors who, like cashiers and agents, were local representatives of the company performing in the State duties for it.

Even if the court should be of opinion that the New York statute was intended to authorize service upon a director who had no duties whatever in the State of New York, and did not represent the company there, the question would yet remain whether such a service would be recognized by the Federal courts as conferring jurisdiction in a suit against the corporation.

This court, speaking by Mr. Justice Gray, in the case of

Goldey *vs.* Morning News, 156 U. S., 518,

after calling attention to the conflict between the New York decisions and the Federal decisions on this subject, said:—

> "It is an elementary principle of jurisprudence "that a court of justice cannot acquire jurisdiction "over the person of one who has no residence within "its territorial jurisdiction except by actual service "of notice within the jurisdiction, upon him or upon "some one authorized to accept service in his be- "half, or by his waiver, by general appearance or "otherwise, of the want of due service. Whatever "effect a constructive service may be allowed in "the courts of the same government, it cannot be "recognized as valid by the courts of any other "government. * * *
>
> "For the same reason service of mesne process "from a court of a State, not made upon the defend- "ant or his authorized agent within the State, al- "though there made in some other manner recog- "nized as valid by its legislative acts and judicial "decisions, can be allowed no validity in the Circuit "Court of the United States after the removal of "the case into that court, pursuant to the Acts of

"Congress, unless the defendant can be held by "virtue of a general appearance or otherwise to "have waived the defect in the service and to have "submitted himself to the jurisdiction of this court."

This language was repeated and the principle reaffirmed in the case of

Conley *vs.* Mathieson Alkali Works, 190 U. S., 406,

in an opinion delivered by Mr. Justice McKenna.

In the application of this principle two rules have been authoritatively settled by this court, viz.:—

First.—Where a corporation is not domiciled or doing business in a State it cannot there be brought into court by service on an officer or agent who, although within the borders of a State, does not represent it there.

Second.—Where a corporation is domiciled or doing business in a State, it may be brought into court by service on any officer or agent on whom service is authorized by the State laws, provided that such officer has such duties or such a position that he can fairly be said to be the corporation's representative in the State for the purpose of service.

There remains yet a third class of cases, viz., those in which the corporation is doing business in a State and service is made in accordance with the State statutes, but upon an officer or agent who cannot fairly be said to represent the corporation in the State.

This case has not yet been decided by this court, and there are two possible views which may be taken with regard to it.

On the one side it may be said that where a corporation does business in a State, it impliedly agrees that service may be made on it in any way authorized by the State

laws, even though the service so authorized is in no sense notice to the corporation and would not be "due process "of law."

On the other side it may be said that service upon a person not the representative of the company in the State is not due process of law, and is so "contrary to natural "justice and to the principles of international law" that a Federal court is not bound either to take or to recognize jurisdiction of such a suit against the corporation; and further, that even if the court could hold that a corporation could waive in advance its right to due service of the writ in a suit against it, such waiver ought never to be implied.

The question has never been expressly decided by this court, since in all the cases thus far decided by it either the corporation has been found not to be doing business in the State or else it has been found that the service was upon one who could fairly be said to be the representative of the corporation in the State for the purpose of service. The question, however, has been more than once alluded to.

In the case of

St. Clair *vs.* Cox, 106 U. S., 350,

the State statute authorized a service upon "any officer, "member, clerk or agent" of a foreign corporation. This court, speaking by Mr. Justice Field, said:—

> "According to the view thus expressed by the "Supreme Court of Michigan, service upon an agent "of a foreign corporation will not be deemed suffi- "cient unless he represents the corporation in the "State. This representation implies that the cor- "poration does business or has business in the State "for the transaction of which it sends or appoints "an agent there. If the agent occupies no repre- "sentative character with respect to the business "of the corporation in the State, a judgment ren- "dered upon service on him would hardly be con-

"sidered in other tribunals as possessing any pro-
"bative force. In a case where similar service was
"made in New York upon an officer of a corporation
"of New Jersey, accidentally in the former State,
"the Supreme Court of New Jersey said that a
"law of another State which sanctioned such serv-
"ice upon an officer accidentally within its juris-
"'diction was 'so contrary to natural justice and
"'to the principles of international law that the
"'courts of other States ought not to sanction it.'
"Moulin *vs.* Trenton Insurance Co., 24 N. J. L.,
"pages 222, 234.

"Without considering whether authorizing serv-
"ice of a copy of a writ of attachment as a sum-
"mons on some of the persons named in the statute,
"a member, for instance, of the foreign corporation,
"that is, a mere stockholder, is not a departure
"from the principle of natural justice mentioned
"in Lafayette Insurance Co. *vs.* French, which
"forbids condemnation without citation, it is suffi-
"cient to observe that we are of opinion that when
"service is made within the State upon an agent of
"a foreign corporation, it is essential, in order to
"support the jurisdiction of the court to render a
"personal judgment, that it should appear some-
"where in the record, either in the application for
"the writ, or accompanying its service, or in the
"pleadings or the findings of the court, that the
"corporation was engaged in business in the State."

In the case of

Barrow *vs.* Kane, 170 U. S., 100,

this court (Mr. Justice Gray delivering the opinion) said:—

"In Insurance Co. *vs.* French, 18 How., 408, 409,
"the court said 'We limit our decision to the case
"'of a corporation acting in a State foreign to its
"'creation under a law of that State which recog-
"'nized its existence for the purposes of making
"'contracts there and being sued on them *through*
"'*notice to its contracting agents.*'* But it was
"cautiously added, 'The case of natural persons

"'or of other foreign corporations is attended with "'other considerations which might or might not "'distinguish it. Upon this we give no opinion.'"

* The italics are not in the opinion.

In the case of

Conn. Mut. Life Ins. Co. *vs.* Spratley, 172 U. S., 602,

already cited, the statute of Tennessee authorized service on "any agent of said corporation found within the county "where the suit is brought, no matter what character of "agent such person may be." This court (Mr. Justice Peckham delivering the opinion) said in regard to this provision of the statute:—

"The third and fourth sections of that Act "have already been set forth, and they provide "that process may be served upon any agent of "the corporation found within the county where "the suit is brought, no matter what character "of agent such person may be. We are not called "upon to decide upon the entire validity of this "whole Act. The Federal question with which we "are now concerned is whether the court obtained "jurisdiction to render judgment in the case against "the company so that to enforce it would not be "taking the property of the company without due "process of law. Even though we might be un- "prepared to say that a service of process upon 'any "'agent' found within the county, as provided in "the statute, would be sufficient in the case of a "foreign corporation, the question for us to decide "is whether upon the facts of this case the service "of process upon the person named was a sufficient "service to give jurisdiction to the court over this "corporation. If it were, there was due process "of law, whatever we might think of the other pro- "visions of the Act in relation to the service upon "any agent of a corporation, no matter what char- "acter of agent the person might be. If the person "upon whom process was served in this case was a "proper agent of the company, it is immaterial

"whether the statute of the State also permits a "service to be made on some other character of "agent which we might not think sufficiently repre- "sentative to give the court jurisdiction over the "corporation. If the service be sufficient in this in- "stance the corporation could not herein raise the "question whether it would be sufficient in some "other and different case coming under the pro- "vision of the State statute."

Then follows the statement of the general rule already quoted on page 8 of this brief, as follows:—

"In a suit where no property of a corporation is "within the State and the judgment sought is a per- "sonal one, it is a material inquiry to ascertain "whether the foreign corporation is engaged in "doing business within the State (Goldey *vs.* Morn- "ing News, 156 U. S., 518; Merchants' Mfg. Co. *vs.* "Grand Trunk Ry. Co., 13 Fed., 358), and *if so, the* "*service of process must be upon some agent so far* "*representing the corporation in the State that he may* "*properly be held in law an agent to receive such* "*process in behalf of the corporation.*"*

* The italics are not in the opinion.

It will be observed that while in every case in this court in which a foreign corporation has been held to be doing business in a State, the service has been made upon an agent who could fairly be said to represent the company for the purposes of such service, and while, therefore, the exact point now under discussion has not been raised, yet this court, whenever it has had occasion to state the general rule as to jurisdiction, has stated not only that the corporation must be doing business in the State, but also that service must be made upon a person who could fairly be said to represent the corporation in the State for this purpose.

It is submitted that whatever may be the power of a State to grant or withhold a license from a foreign corporation, it can pass no statute which would compel the

Federal courts to take or recognize jurisdiction over that corporation in a suit in which there has been no service upon a representative agent of the corporation—no service which is equivalent to a personal service in the case of an individual. The right to appeal to the Federal courts and the right to be exempt from suit and judgment except by due process of law are rights which cannot be taken away from a corporation simply because it is doing business within a State. It may be that the State can expel the corporation from its borders, but it cannot oust the jurisdiction of the Federal courts or compel those courts to give judgment where there has been no real service.

The limitations upon the power of a State are tersely and accurately set out in the recent opinion of this court, delivered by Mr. Justice Peckham, in

Cable *vs.* U. S. Life Ins. Co., 191 U. S., 288,

as follows:—

> "It has from an early day been held that a corporation created by one State could transact "business in another State only with the consent, "expressed or implied, of the latter State, and that "such consent might be accompanied by such conditions as the latter State might think fit to impose, provided they were not repugnant to the "Constitution or laws of the United States, or inconsistent with those rules of public law which "secure the jurisdiction and authority of each "State free from encroachment by all others, or that "principle of natural justice which forbids condemnation without opportunity for defense."

In the case of

Barron *vs.* Burnside, 121 U. S., 186,

this court held that the jurisdiction of the United States could not be taken away by a State statute requiring foreign corporations to stipulate that they would not remove cases to the Federal courts. The court (Mr. Justice Blatchford delivering the opinion) said:—

"As the Iowa statute makes the right to a permit "dependent upon the surrender by the foreign cor- "poration of a privilege secured to it by the Consti- "tution and laws of the United States, the statute "requiring the permit must be held to be void."

In the present case, if the New York statute is to be construed as authorizing a service upon a person who under the decisions of this court is not really its representative, then it amounts to a provision that if the corporation does business within the State, it shall submit to judgments against it without due process of law. This, it is submitted, is beyond the power of the State. The doctrine has been very admirably stated by the United States Circuit Court for the Middle District of Pennsylvania in the case of

Frawley *vs.* Penna. Casualty Co., 124 Fed. Rep., 259.

as follows:—

"The doctrine is thus authoritatively stated by "Mr. Justice Peckham in Conn. Life Ins. Co. *vs.* "Spratley, 172 U. S., 602: 'In a suit where no prop- "'erty of the corporation is within the State, and "'the judgment sought is a personal one, it is a "'material inquiry to ascertain whether the foreign "'corporation is engaged in doing business within "'the State; * * * and if so, the service of "'process must be upon some agent so far repre- "'senting the corporation in the State that he may "'properly be held, in law, an agent to receive such "'process in behalf of the corporation.' These "jurisdictional facts the State necessarily cannot "control, and it cannot, therefore, declare or pre- "scribe in advance what shall be taken as the "doing of business within its borders, nor what "shall constitute a sufficiently representative agency. "Both must be determined by the courts upon the "facts as they arise, according to the principles of law "which apply."

To briefly recapitulate it is submitted:—

First.—That while a foreign corporation may be amenable to suit in a State other than the State of its incorporation it is only so amenable when it really enters the other State and through its agents therein attempts to carry on its business there.

Second.—That the findings in the present case show that the corporation while endeavoring to induce customers from other States to come into Pennsylvania and deal with it there, never, in point of fact, carried on its business or any branch of it in New York.

If this question is decided in favor of the company the other questions become unimportant, but if it should be decided against the company then it is submitted.

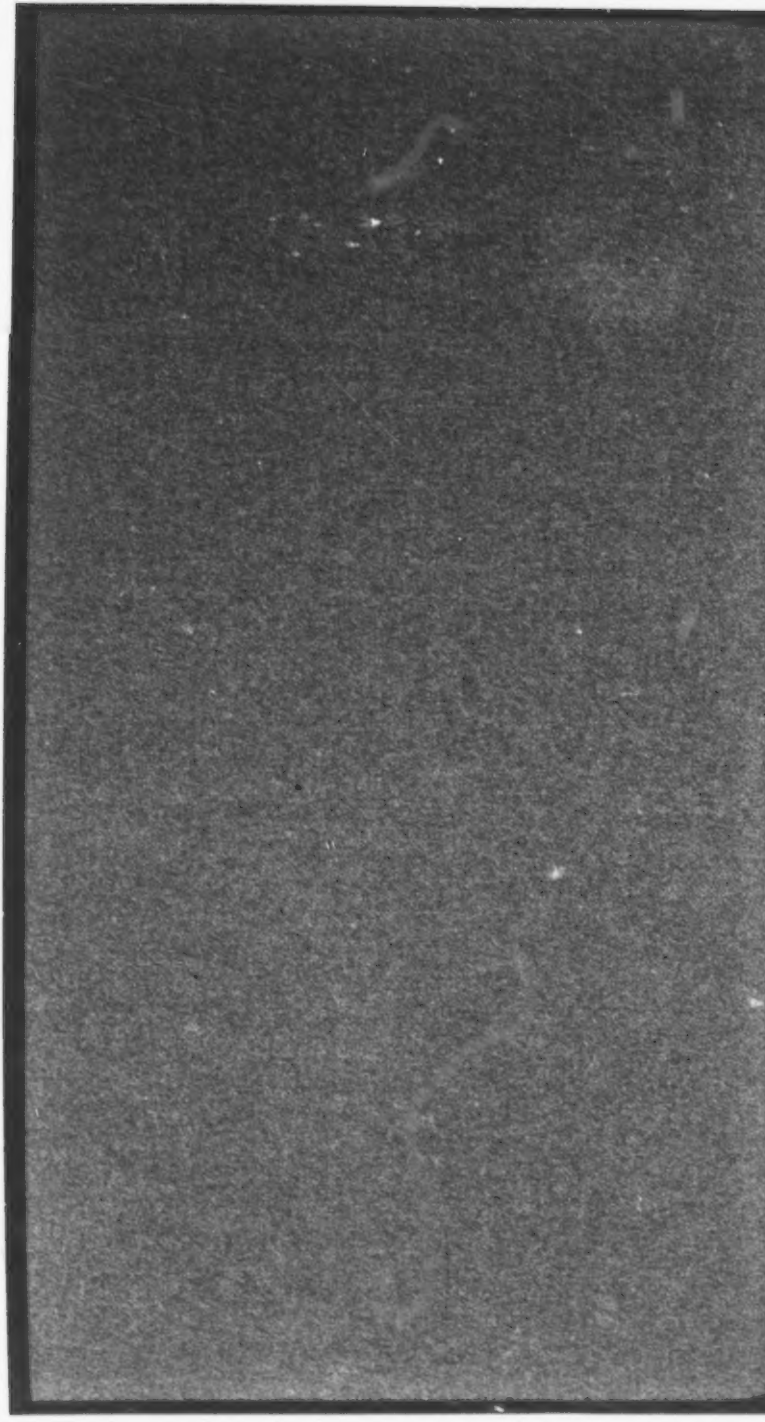
Third.—That the cause of action did not arise in New York, and therefore the service was not authorized by the New York Code.

Fourth.—That the New York Code is to be interpreted as authorizing a service only on a director who, as such, is representing the company in New York.

Fifth.—That, irrespective of any interpretation of the New York Code, service on a director who was not representing the corporation in New York, who had no duties in New York and who transacted no business for the company in New York, was not such a service as would sustain jurisdiction in the Federal courts.

It is submitted, therefore, that the question certified should be answered in the negative.

FRANK P. PRICHARD,
For Plaintiff in Error.



Supreme Court of the United States.

October Term, 1904. No. 182.

Pennsylvania Lumbermen's Mutual Fire Insurance Company,

Plaintiff in Error,

vs.

Charles C. Meyer,

Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought to recover upon three policies of insurance issued by the plaintiff in error upon saw mill property in Rochester, N. Y. The action was originally commenced in the Supreme Court of the State of New York, and upon application of the plaintiff in error was removed into the United States Circuit Court for the Western District of New York. After the case had been so removed into the United States Circuit Court, the insurance company moved to set aside the service of the summons upon the ground that it was a foreign corporation and was not doing business in the State of New York, and that the Supreme Court of that State acquired no jurisdiction of it by the service of process on one of

its resident directors within that State. The Circuit Court decided that the insurance company was doing business in the State of New York, that service of the summons on one of its directors within the State was sufficient, and denied the motion. The decision is reported in 108 Fed. Rep. 169. The case was tried before the court without a jury and resulted in a judgment for the plaintiff (defendant in error). Upon a writ of error to the United States Circuit Court of Appeals, that court rendered a decision affirming the judgment of the Circuit Court upon the merits, but at the request of the plaintiff in error certified the question of jurisdiction to this court, and withheld the formal entry of judgment until that question should be determined. The case in the Circuit Court of Appeals is reported in 126 Fed. Rep. 352, and 61 U. S. Cir. Ct., App. R. 254.

The plaintiff in error insists strenuously that the State court never acquired jurisdiction over it by the service of the summons on one of its directors within that State, and this contention is based upon three grounds.

First.—That the cause of action did not arise within the State of New York, and that therefore, even under the practice code of that State, the service was void.

Second.—That the plaintiff in error, a foreign corporation, was not doing business in that State, and under the decisions of the United States courts it could not be sued in that State, and

Third.—That even if it were doing business in that State, a director who took no part in the business of the Company within the State is not a proper officer or agent of the corporation upon whom a valid service of process can be made.

I shall consider each one of these grounds of objection separately.

FIRST.

The service of the summons upon the defendant (plaintiff in error) was sufficient under the laws of New York.

Section 432 of the Code of Civil Procedure of that State which provides for the manner of serving mesne process on a foreign corporation reads as follows:

> Sec. 432. Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:
>
> 1. To the president, treasurer, or secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.
>
> 2. To a person designated for the purpose by a writing under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of state. The designation must specify a place, within the State, as the office or residence of the person designated; and if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated, may from time to time, change the place specified as his office or residence, to some other place within the State, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.
>
> 3. If such a designation is not in force, or if neither

> the person designated, nor an officer specified in sub-division first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

It is conceded that the company had no designated agent in New York and that the officers mentioned in sub-division 1 of the section were not within that State. The service of the summons was therefore made in pursuance of the provisions of sub-division 3 of that section. It is admitted that the service was made on a director of the company, but it is urged that the cause of action set out in the complaint did not arise within that State, and hence the service was insufficient.

It is submitted that the cause of action did arise within the State of New York. A policy of fire insurance is essentially a contract of indemnity. Although the policies in suit are not set out in full in the certificate from the Circuit Court of Appeals to this court, yet the standard fire insurance policy is of such general use that the courts will take judicial notice of its provisions. Indeed, the use of the standard fire insurance policy in the insurance of property in the State of New York, whether insured by a domestic or a foreign insurance company, is made obligatory by the laws of that State (Laws of 1892, chap. 36, sec. 121). By the express terms of the policy the company agrees to indemnify the insured against loss by fire in either one of two ways at its option; by repairing or rebuilding the property damaged or destroyed, or by paying the loss, to the extent of its liability, in money. In either form of indemnity the loss is to be made good to the insured where it occurs. If the company elects to indemnify the insured by restoring the property damaged by fire, it obviously can only perform the contract on its part where the property is situated, and the injury has been sustained. If on the other hand, it chooses to pay

the equivalent of the loss in money, it is equally its duty to make the payment where the loss occurs. In the present case the insured property was located in the State of New York, where the defendant in error also resided. It was there that the insurance company, by its contract of insurance, agreed to indemnify him against the loss, which he has sustained, and it is there that the company's default occurred by reason of its failure to perform its contract.

The claim which is repeatedly made in his brief (pp. 11, 32) by the counsel for the plaintiff in error, that, under the terms of the policy, the loss is to be paid at the company's office in Pennsylvania, cannot be sustained. The policies are absolutely silent as to the place of payment, and in the absence of any provision on the subject in the policy, the fair and reasonable presumption is that the payment of money, if the company elects that form of indemnity, shall be made where the loss occurred.

Another elementary principle may be invoked at this point, and that is, that in contracts for the payment of money, if the instrument is silent as to the place of payment, it is the duty of the debtor to seek out the creditor and make payment to him at his place of residence. This rule is not affected by the fact that the parties happen to reside in different States, unless the diversity of state residence is owing to the removal of the creditor into another State subsequent to the execution of the contract. If A, residing in Pennsylvania, makes his note or bond payable to B, who resides in New York, it, in the absence of anything in the instrument or in the surrounding circumstances to indicate a different place of payment, is payable in the latter State.

Sanderson vs. Bower, 14 East, 517.
Hale vs. Patton, 60 N. Y. 233.
Dockham vs. Smith, 113 Mass. 330.

If the policies in suit are to be held to create a liability

on the part of the company, in case of loss, for the payment of money, in other words, a debt, and such is undoubtedly the effect of the instrument in case the company neglects to avail itself of the option to indemnify the insured by restoring the property, then the rule just referred to would seem to apply, for, to quote the words of an eminent author, *Wood on Fire Ins.*, 322 (2d ed.):

> "Immediately upon the happening of the loss, the 'loss of the assured, to the extent of the amount 'insured, becomes a debt against the company which 'it is bound to discharge as other debts are dis-'charged."

Where the cause of action in the present case arose is not determined by the question of where the contract was made, but by where it was to be performed by the company in the event of a loss occurring to the insured property. That depends upon the terms of the contract construed in relation to the nature and *situs* of the subject matter. The terms of the policy and the company's obligation thereunder would remain the same, whether the policy was issued direct from the home office in Philadelphia, or through a duly established agency in the State of New York, but had the policies in fact been issued through a local agent in New York, it would hardly be contended that the cause of action did not arise in that State.

That the contract represented by a fire insurance policy, is, in case of a loss under it, to be performed on the part of the company where the insured property is situated and the loss occurs, is indicated in the discussion of the subject in *LaFayette Ins. Co. vs. French*, 18 How. 404, where the court uses the following language:

> "We find nothing in this provision either unreason-'able in itself or in conflict with any principle of 'public law. It can not be deemed unreasonable that 'the State of Ohio should endeavor to secure to its 'citizens a remedy, in their domestic forum, upon this 'important class of contracts made and to be per-'formed within that State, and fully subject to its

'laws; nor that proper means should be used to com-
'pel foreign corporations transacting this business of
'insurance within the State, for their benefit and profit,
'to answer therefor the breach of their contracts of
'insurance there made and to be performed."

And also in *Paul vs. Virginia* 75 U. S. 168, where at page 183 the court says:

"The policies are simply contracts of indemnity
'against loss by fire entered into between the cor-
'poration and the insured for a consideration paid by
'the latter. . . . . Such contracts are not inter-
'state transactions though the parties live in different
'states. The policies do not take effect, are not exe-
'cuted contracts, until delivered by the agent in Vir-
'ginia. They are then local transactions and are
'governed by the local laws."

Again if the contention be true, that a loss under the policies issued by the company is payable only at its office in Philadelphia, and that in default of payment a breach of the contract on its part occurs, and in consequence, a cause of action arises, there and nowhere else, it necessarily follows that in the event of a loss occurring anywhere under one of its policies, unless the company had expressly denied any liability on its part, the insured in order to maintain an action on his policy must first demand payment of the company at its home office, for otherwise, the company might defeat his action by showing that it had, at all times, been ready to pay at it office where the loss was payable. This I apprehend would be regarded by both the courts and the legal profession as a novel and startling doctrine.

Upon principle, therefore, it seems to me very clear that the cause of action in this case arose in the State of New York, and that under the laws of that State the State court acquired jurisdiction of the plaintiff in error by the service of the summons on one of its directors within the State. That such is the construction placed upon the provision of its code of Civil Procedure under

consideration, by the courts of that State there can be no doubt. I cite one or two cases:

Childs vs. Harris Mfg. Co., 104 N. Y. 477.

It appeared in that case that defendant, a corporation created under the laws of, and doing business in Wisconsin, sold plaintiffs, who were doing business in New York, certain agricultural implements with an agreement to indemnify them against claims for infringement of any patent, provided notice was given to it of any suit for infringement, and it was allowed to take charge of the case. Plaintiffs were afterwards sued for an alleged infringement of a patent. They notified the defendant of the suit and requested it to take charge of the defense. This it did not do and judgment was recovered in that action against the plaintiffs, which they paid. They then commenced this action by service of the summons on a director of the defendant within the State. Defendant thereupon moved to set the service aside on the ground, (1) that it was not made on the proper officer, (2) that the defendant has no property in the State, and (3) that the alleged cause of action did not arise within the State. The Court of Appeals, Judge Danforth writing the opinion, says at page 480:

> "It was enough if the cause of action arose in the 'State and Crosby was in fact one of defendant's 'directors. (Code sec. 432, subn. 3). As to the cause 'of action, it accrued when the defendant failed to 'perform its its contract, and by reason of its failure 'plaintiff sustained a loss. These events occurred in 'this State. . . . . It is immaterial that the con- 'tract to indemnify was made in Wisconsin, its (de- 'fendant's) obligation was to be discharged wherever 'the plaintiffs were vexed by litigation."

Although the doctrine of this case, in so far as it holds that a foreign corporation which is not engaged in business in the state may be sued in the courts of the state, has been disapproved in the United States Courts,

its decision as to the cause of action, and where it arose, has, so far as I am aware, never been criticised.

An analogous question arose in *Ithaca Fire Department vs. Beecher*, 99 N. Y. 429. Defendants, who were insurance agents in New York city, were sued in Tompkins county to recover a penalty for their failure to pay the license for insuring property in the city of Ithaca prescribed by chapter 465 of the Laws of 1875. Defendant moved for a change of venue to New York county, on the ground that the cause of action arose in that county and should have been brought there, under sec. 983 of the Code of Civil Procedure. The Court of Appeals overruled that contention and in the course of its opinion at page 432 said:

> "We think the whole cause of action arose in the 'village of Ithaca. The percentage of premiums was 'required to be paid there; the bond was required 'to be given there; the penalty was payable there, 'and the insurance was effected upon property situ-'ated there. Out of some or all of those facts the 'cause of action arose. It matters not where the 'contracts of insurance were actually signed, they 'took effect upon property in the village of Ithaca."
>
> "The construction contended for by the defendants 'would allow the agents of foreign insurance com-'panies, provided they issued policies outside of the 'State, to carry on their operations within the State, 'without incurring any penalty under the statute, as 'it can operate only within the State. A construc-'tion which would lead to such a result should not 'be adopted unless a fair interpretation of the law 'and facts require it."

It was held in *Greiser vs. Mass. Benf. Assn.*, 39 N. Y. State R. 1, that the cause of action on a policy of the defendant, a foreign corporation, arose within this State, where the death of the insured occurred at her residence in this State.

To the same effect are *Fidelity Mutual Life Assn. vs. Fieklin*, 21 Atl. R. 680 and *Burckle vs. Eckart*, 3 N. Y. 132.

As to whether the service of process issued by a State court will be deemed sufficient under the laws of that State, the decisions of the highest courts of the State on that point will be regarded as controlling upon the Federal Courts.

Exparte Schollenberger, 96 U. S. 369.
Northwestern Mut. Ins. Co. vs. Woodworth, 111 U. S. 146.
Amy vs. Watertown, 130 U. S. 301.

This deference to the decisions of the State courts only extends to the construction of the State statutes regulating the service of process, and does not embrace the broader question, whether the service of process on a non-resident, whether an individual or a corporation, authorized by the laws of the State, is reasonable or not. This brings me to the second objection which is made to the validity of the service of the summons on the plaintiff in error in the State Court, viz: that the company was not doing business in the State of New York.

SECOND.

The plaintiff in error was doing business in the State of New York at the time the cause of action accrued, and also at the time the action was commenced.

It may be noted at the outset, in the discussion of this point, that the question involved in this case is not, whether the company is engaged in transacting business in New York in such a manner as to subject it to the severe penalties which by the laws of that State are imposed on foreign corporations doing business in the State in violation of its laws. Those statutes, and the similar statutes of other states, are highly penal in their provisions and subject the offending corporation, in certain cases, to heavy fines, in other cases, to a forfeiture of its contracts, and in other instances to both fines and forfeit-

ures. Many of the cases cited by counsel for the plaintiff in error arose under such statutes and involved their construction. They have only a remote, if any, bearing on the present case.

The question which arises and is to be determined here is, was the company doing business in New York to such an extent, or in such a way, as to permit of its being sued in the courts of that State? The statutes of the State authorize such an action.

Section 1780 N. Y. Code Civ. Pro., which reads as follows:

> Sec. 1780. "An action against a foreign corporation may be maintained by a resident of the State, or 'by a domestic corporation, for any cause of action. 'An action against a foreign corporation may be maintained by another foreign corporation or by a non-'resident in one of the following cases only:
>
> (1) 'Where the action is brought to recover for 'the breach of a contract, made within the State, or 'relating to property situated within the State, at 'the time of the making thereof.
>
> (2) 'Where it is brought to recover property situate within the State, or a chattel, which is replevied within the State.
>
> (3) 'Where the cause of action arose within the 'State, except where the object of the action is to 'effect the title to real property situated without the 'State."

Now let us examine the facts as certified to this court, in order to see if they are sufficient to justify the trial court in holding, in support of its jurisdiction of the plaintiff in error, that it was doing business in the State of New York, for the presumption is that that court has found every fact essential to its jurisdiction, of which there is proof or evidentiary facts to support it.

In the first place it should be kept in mind that the company is engaged in the business of insuring immovable property consisting of mills and other buildings

against loss by fire. In the prosecution of that business the court below certifies that

> "Ever Since the plaintiff in error was incorporated it 'has been engaged in the business of insuring property located in the 'State of New York and other 'States against loss by fire, and has sent by mail circulars from Philadelphia into said State soliciting 'business. In the prosecution of its business and for 'the purpose of increasing it, the company sends its 'general manager to the different conventions of 'lumbermen held in the State of New York for the 'purpose of urging upon those attending upon such 'conventions the advantage of insuring with it. It 'sends its adjusters into the State of New York when 'a loss by fire occurs there to property insured by 'it, for the purpose of adjusting the amount of such 'loss. It originally placed insurance upon the property covered by the policies in question after its 'manager had pointed out the advantage of insuring 'in the company, the conversation being had at the 'city of Rochester, in said State."
>
> "At the date of the service of the summons, as 'aforesaid, the said company had, and now has, about 'nine hundred thousand dollars ($900,000) outstanding 'standing insurance on property within the State of 'New York, which is something less than one-third 'of its total risks. The applications therefor were 'made by mail, addressed to it at Philadelphia, and 'the policies were executed and issued at that city 'and sent by mail from there to the insured within 'the State of New York."

Tested by the dictates of common sense, and the rules which prevail among business men, the facts here disclosed establish conclusively that the company is doing business in New York, and the Circuit Court was abundantly justified in reaching that conclusion. If it be held in the face of these facts, that the company is not doing business in that State it must be in deference to some technical rule of law, the subtle meaning and force of which, are incomprehensible to the lay mind. What amounts to doing business in the legal sense, and what

to doing business according to ordinary business standard, may. if the contention of counsel is correct, be entirely different things. I do not think that any such distinction exists, but that what constitutes doing business according to common judgment, is the test, within the intent of the rule which we are now considering.

A brief consideration of the facts is, it seems to me, all that is necessary. It is manifest, that from the beginning, it has been the settled policy of the company to exploit its business in the State of New York to the utmost extent, and so dilligent and successful have its efforts been along this line that nearly one-third of its insurance is upon property in that State.

Its policies are contracts of indemnity to make good to the insured any loss which he may sustain by fire, and within the contemplation of the law such indemnity or making good the loss must have effect where the loss occurs. Furthermore, under the terms of the policies the indemnity may at the company's .option be made either by the actual rebuilding or restoration of the property destroyed or damaged, or by compensating the insured for the loss by its equivalent in money, either of which forms of indemnity must be made where the loss occurs. The performance of the contract of insurance by the company is as much a part of its business as the making of the contract. The appraisal and adjustment of losses is therefore as much an integral part of its business as the issuing of the policies, but whatever may be claimed by the plaintiff in error as to the place where it makes and issues its policies, it is undisputed that the adjustment of the losses which occur in the State of New York is made in that State.

The company makes a practice, and has from the outset, of sending its adjusters into that State for the purpose of settling losses which occur under its policies there. It sends its general manager to the different lumbermen's conventions held in that State, for the purpose of attract-

ing business there, and it floods the States with its circulars soliciting local insurance. It originally procured insurance on the property in question through the personal solicitation of its general manager at the city of Rochester, N. Y.

In view of the nature of the company's business it is apparent that in the most essential and vital respects it is conducting a substantial part of its business in the State of New York.

In support of its claim that notwithstanding that nearly one-third of its business is within that State, nevertheless it is not doing business there, the plaintiff in error relies upon two circumstances, (1) that it has not complied with the laws of that State authorizing it to do business there, and (2) that it does not maintain a local office or employ local agents within that State. The first suggestion simply amounts to this, that because the company is not doing business *lawfully* within the State, therefore it is not doing business there at all. It will not, I apprehend, be necessary to dwell longer on this point. For the purpose of permitting suit to be brought against it in the courts of that State, the same business conduct on its part within the State which will suffice, in case it was lawfully there, will also be sufficient where it is attempting to do business there in violation of State laws.

It is undoubtedly true that the plaintiff in error had not complied with the laws of the State of New York, so as to permit it lawfully to engage in the fire insurance business within that State; but it is equally true that it has been, at all times since its organization, diligently striving to reap the benefits which the conditions and opportunities in that State offer to those engaged in the business of fire insurance, without assuming the burdens and responsibilities which the laws of that State impose upon domestic and foreign fire insurance companies alike, and with what to it must be gratifying success.

There remains to be considered the other point, viz. that it is not doing business in New York, because it does not maintain an office or employ local agents there. The statement in the certificate on page 3 that "the company 'has no agent or officers within that State and has not had 'at any time," has reference, of course, to permanent local agents within the State. The answer is that neither a local office nor local agents are essential to enable an insurance company to do business in a foreign state. No well considered case decides any such doctrine, while in the *Spratley case*, 172 U. S. 602, this court said:

> "It cannot be said with truth, as we think, that an 'insurance company does no business in a State unless 'it have agents therein who are continuously seeking 'new risks, and it is continuing to issue new policies 'upon such risks."

Indeed, the counsel for the plaintiff in error, while strenuously insisting upon the validity of his contention in one part of his brief, in another part seems to concede its inherent vice, for at page 12 he says:

> "The business of the foreign corporation might be 'of such a character as to necessarily involve posses- 'sion of, or title to, or work upon, property in the 'foreign State, or the corporation might, for its own 'convenience, voluntarily send its agents into the 'foreign state to solicit or execute or perform its 'contracts."

That is precisely what we contend the company has done; that ever since it was organized, it has, from time to time, sent its agents into the State of New York "to solicit or execute or perform its contracts," in relation to its business there.

The acts which a local agent does in the prosecution of the company's business may be done by an agent or representative of the company who resides outside the the State, but who comes into the State from time to time for that purpose. Nor is it essential that the business be carried on there continuously. It is certainly

sufficient if, in pursuance of the settled policy of the company, its agents go into the State and there perform certain duties and acts in the promotion of the company's business. Neither is it important that all branches of the company's business should be carried on within the State. Nor is the extent or amount of business carried on there controlling. What the Federal Courts do hold is that before a state court may acquire jurisdiction over a foreign corporation, in a suit against it, it must be doing some business in that State.

In the case of a fire insurance company the issuing of policies is not all there is of its business: indeed the filling out and executing the policy is the least part of that branch of its operations which consists in "getting business." The real work of getting business are the soliciting and the arguments used which finally convince the owner of the benefits of insuring with the company, and which induce him to take a policy. The filling out of the application on the one side, and the policy on the other are only the formal parts of the contract.

The plaintiff in error it seems confines its insurance to certain kinds of risks. Its customers are mainly lumber dealers, and the owners of saw mills. It solicits business largely by means of its circulars which are distributed through the mails. It makes the post office department, and its employees, in whatever state their duties are performed, its agents in the prosecution of that branch of its business. That is one of the means by which it procures risks in the State of New York. But it is not the only means. In the words of the certificate, "In the 'prosecution of its business and for the purpose of 'increasing it, the company sends its general manager to 'the different conventions of lumbermen held in the State 'of New York for the purpose of urging upon those 'attending upon such conventions the advantages of 'insuring with it." The company well knows that property owners must first be persuaded of the advantages of

insuring with it before they will apply for insurance, hence the supreme importance of having that branch of its business well attended to. It is in the prosecution of that part of its business that it sends its general manager to the lumbermen's conventions. He goes there, where he can meet a hundred or more possible customers, to engage in the same line of work for his company in extending its business, that he would do if he should visit each of them at his place of business, for the purpose of soliciting his insurance. It is fair to assume that it is through these means, the distribution of its circulars throughout the State and the personal solicitation of its general manager within the State in the manner stated, that the company has been enabled to secure the large amount of insurance which it has placed on property in that State. It was in this way that its original policies of which those in suit are the renewals were placed on the insured property through the personal solicitation of its general manager at Rochester, N. Y.

But the making of Insurance contracts and the issuing of policies is not the whole of the company's business. The adjustment of losses and the settlement of claims are equally a part of its business. In carrying on this branch of its business so far as it relates to risks in the State of New York, the company sends its adjusters into that State, whenever a loss occurs there, to adjust the amount of the loss. The learned counsel for the plaintiff in error contends that there is nothing in the record to show that the adjusters "were other than mere appraisers sent to estimate the value of the goods and the amount of the loss and report to the company." This contention finds no warrant in the language of the certificate from the court below. The court certifies,

> "It sends its adjusters into the State of New 'York when a loss by fire occurs there to prop-'erty insured by it, for the purpose of adjusting 'the amount of such loss."

The duties of an insurance appraiser and of an insurance adjuster are very different. It is the business of an insurance adjuster to settle the amount of loss with the insured, to adjust the same. As defined by Webster, "To *adjust* in its fair meaning, is to settle or bring to a satisfactory state so that the parties are agreed in the result."

Mayor vs. Hamilton Fire Ins., 39 N. Y. 45.

It is a matter of common knowledge, of which courts will take judicial notice, that in ninety-nine cases out of one hundred, fire losses of more than a trifling amount are settled through the agency of the company's adjusters. The matter of settling losses or of agreeing with the owners upon the amount of the loss is a very important feature of the business of fire insurance. It will scarcely be contended that if the plaintiff in error maintained a permanent office in New York for an agent whose business it was to adjust the losses occurring in that State, it would not be doing business there, but in that case its local adjuster would only be doing, in that State, what, under the present methods of conducting its business, is done by the adjusters which it sends into the State.

If the company had complied with the laws of the State of New York, in order to enable it to do business lawfully in the state, and in pursuance of that permission instead of maintaining local offices and employing local agents it had seen fit to conduct its business in that State, by the methods and in the manner, it has actually followed, there could then have been no question about its doing business in the State. But merely taking the requisite steps to comply with the laws of New York is not doing business in that State. What acts, after those steps have been taken, will amount to doing business in the State, must of necessity have the same result although no such steps have been taken. The only effect of a compliance with the State laws is to make lawful business dealings which otherwise would be unlawful.

To recapitulate, (1) It is the settled policy of the company, and has been since its organization, to exploit its business in the State of New York. (2) In order to attract business there it distributes its circulars in that State through the agency of the U. S. mails. (3) For the same purpose it sends its general manager into the State from time to time to urge upon the lumbermen whenever he can find them gathered together in sufficient numbers, the advantages of taking out insurance in his company. (4) It makes a practice of sending its adjusters into the State to adjust the losses as they occur. (5) So successful has been this method of conducting its business in that State that nearly one-third of its entire insurance is placed there. In view of these facts can it truthfully be said that the company is not transacting any part of its business in the State of New York?

It has long been the settled policy of the different States, including New York (L. 1892, chap. 690, secs. 25–36. Sec. 1780, Code Civ. Pro.) to require foreign corporations doing business in the State to submit to be sued in the State courts. This policy has been sanctioned and commended by the Federal Courts. And it is immaterial, so far as its liability to be sued in the State courts is concerned, that the foreign corporation is doing a clandestine business in the State. The rule is well expressed in the *Spratley case*, 172 U. S. 602, where the court in the course of its opinion says:

> "A vast mass of business is done throughout the 'country by corporations which are chartered by 'States other than those in which they are transact-'ing part of their business, and justice requires that 'some fair and responsible means should exist for 'bringing such corporations within the jurisdiction 'of the courts of the States where the business was 'done, out of which the dispute arises."

This is no new doctrine, but has been repeatedly declared and enforced by this court since the case of

Lafayette Ins. Co. vs. French, 19 How. 404.
See also *Ex parte Schollenberger*, 96 U. S. 369.
R. R. Co. vs. Koontz, 104 U. S. 10.

Upon the question whether the plaintiff in error was doing business in New York it seems to me that the case of *Connecticut Mut. Fire Ins. Co. vs. Spratley*, 172 U. S. 602, already cited is decisive. There, as in this case, the jurisdiction of the State court over the defendant, a foreign corporation, was involved. Action had been brought against the insurance company in the State court of Tennessee by service of process on an agent of the company who was temporarily within the State. The company had at one time carried on business in the State through local agents, but in 1894 it withdrew all its agents from the State and ceased issuing any new policies in the State, and notified the Insurance Commissioner to that effect. It had, however, a number of policies outstanding in the State and it continued to receive premiums on these policies through its former agent and to settle by payment or otherwise the claims upon the policies in that State as they fell due. The former agent resided in Louisville, where he received payment of the premiums, and it did not appear that he was in the State of Tennessee when any payment of premiums was made to him by Tennessee policy holders. Spratley died in 1896 and the company sent its investigating agent to Memphis, solely to adjust the claim, and while there endeavoring to settle the claim, action was brought on the policy against the company by service of process on him.

The proof of service recited that the defendant was doing business in Shelby County, Tenn., but that it had no office or agency there. The Supreme Court held the service to be sufficient. In the course of its opinion, the court says:

"We think the evidence in this case shows that 'the company was doing business within the State

'at the time of the service of process. From 1870 'until 1894, it had done an active business through-'out the State by its agents therein, and had issued 'policies of insurance upon the lives of citizens of 'the State. How many policies it had so issued does 'not appear. Its action in July, 1894, in assuming to 'withdraw from the State, was simply a recall of its 'agents doing business therein, the giving of notice 'to the State insurance commissioner, and a refusal 'to take any new risks or to issue any new policies 'within the State. Its outstanding policies were not 'affected thereby, and it continued to collect the pre-'miums upon them and to pay the losses arising 'thereunder, and it was doing so at the time of the 'service of process upon its agents.

"It cannot be said with truth, as we think, that an 'insurance company does no business within a State 'unless it have agents therein who are continuously 'seeking new risks and is continuing to issue new 'policies upon such risks. Having succeeded in tak-'ing risks in the State through a number of years, it 'cannot be said to cease doing business therein when 'it ceases to obtain or ask for new risks, or to issue 'new policies, while at the same time its old policies 'continue in force and the premiums thereon are con-'tinuously paid by the policy holders to an agent 'resident in another State, and who was once the 'agent in the State where the policy holders resided. 'This action on the part of the company constitutes 'doing business within the State, so far as is neces-'sary, within the meaning of the law upon this sub-'ject. And this business was continuing at the time 'of the service of process on Mr. Chaffee in Mem-'phis."

That it is not essential, in order to enable a foreign corporation to carry on business in a State, for it to maintain a local office or employ local agents there, is held in *Chattanooga Bldg. & Loan Association vs. Denson*, 189 U. S. 408. In that case, plaintiff, a Tennessee corporation, brought an action in Alabama to foreclose a mortgage on property in that State. The defense was that the loan was illegal because the Association had not complied

with the laws of Alabama in regard to foreign corporations doing business there.

The question was whether the Association was in fact doing business in that State. It was conceded that it had no local office or agent in Alabama; it had, however, a traveling agent whose business it was to solicit subscriptions to its stock, and to obtain applications for loans, and submit the same to the home office of the Association at Chattanooga and the loan in question was procured in that way.

The court at p. 414 says:

> "The petitioner is a Building and Loan Association. Its corporate purpose is to lend money to its stockholders. The respondent Denson was one of its stockholders, and manifestly regarding the essence of the transaction between them, this constituted a doing of business within the State of Alabama. But it is insisted that on account of the form and terms of the instrument, and by operation of law, the loans must be regarded as having been made in Tennessee. It is said the note and mortgage were drawn in Tennessee and by their express terms were payable in there. . . . Further, the petitioner's part of the transactions was performed in the State of Tennessee. The application of Denson was presumably solicited as other applications were, and if what was done in pursuance of it did not constitute doing business in the State, the effect would be as expressed by the Circuit Court of Appeals that petitioner and other foreign corporations engaged in the same business of loaning money on real security may safely flood the State of Alabama with its soliciting agents, make all the negotiations for loans, take real estate securities therefor and fully transact all other business pertaining to their corporate functions, as though incorporated therein, and yet neither be obliged to have a known place of business or any authorized agent within the State."

The case of *New Haven Pulp and Board Co. vs. Downington Mfg. Co.* 130 Fed. Rep. 605 is to the same effect.

In that case defendant, a Pennsylvania corporation, was sued in Connecticut by service on one of its agents temporarily within that State. It had never had an office or local agent in that State, had not complied with the laws of that State to enable it to carry on business there, but the proofs showed that it had sent its agent into the State and there negotiated sales of the products of its factory to a limited extent. On plea in abatement and to the jurisdiction, the court said:

> "The court did not invite the cause, but it is here 'and unless an inexorable sanction exist, it is not in-'clined to force a domestic corporation to migrate 'to a foreign forum in search of justice. It would 'seem ungracious for the defendant to permit its 'agent to visit Connecticut concerning matters which 'touch one branch of the transaction, and to object 'to service upon such agent of a notice that the plain-'tiff seeks to recoup in one direction what it has 'lately lost in another. The stipulation sufficiently 'states acts of business done by the defendant to sus-'tain the validity of the service. . , . It is impos-'sible to assent to the proposition that doing business 'within a state means a persistent or continuous con-'dition of doing or offering to do business, usually 'leading to the appointment of an agent or the estab 'lishment of an office within the State." (p. 608.)

See also Firemen's Ins. Co., 155 Ill. 204.

As was said in *Barrow Steamship Company vs. Kane*, 170 U. S. 100,

> "The constant tendency of judicial decisions in 'modern times has been in the direction of putting 'corporations upon the same footing as natural per-'sons in regard to the jurisdiction of suits by or 'against them." (p. 106.)

THIRD.

The essential conditions having been shown to exist, the State Court obtained jurisdiction of the plaintiff in error by service of process on one of its directors within the State.

The claim is made by its counsel that in order to make such service valid, the director must have been employed at the time in the company's business. That is probably the rule in the case of an agent or employee of a foreign corporation who has been served with process. The cases cited by counsel in his brief, go no further than that. No case, so far as I am aware, holds that where a foreign corporation is domiciled or doing business in another State, valid service may not be made on an officer or director of the corporation, even though such officer or director may not be there engaged in the business of the corporation. In every case where service upon an officer or a director of a foreign corporation has been set aside, it has been on the ground that the corporation was not doing business in the State, and never upon the ground that the officer or director, not being there engaged in the company's business, was not a proper representative of the company upon whom service could be made.

In *St. Clair vs. Cox*, 106 U. S., 353, directors are particularly named as proper officers of a corporation on whom service of process may be made.

In *Conley vs. Mathieson Alkali Works*, 190 U. S. 406, service of the summons was made on a director, but the service was held bad for the sole reason that the defendant, a foreign corporation, was not doing business in New York, where the action was commenced. No suggestion was made that a director was not a proper officer on whom service of process against the corporation might be made.

The rule that service upon its agent, of process against a corporation, in order to be valid, must be upon an agent who at the time represents the corporation in the State, in other words, is employed there in its business, is a reasonable one, but it has no application to the service of process upon the officers and directors of the corporation. In the broadest sense the directors have charge and oversight over its entire business, and therefore may be said to represent it, wherever that business is carried on. A director of the plaintiff in error bears the same relation to its insurance business in New York that he does to its business in Pennsylvania, has the same duty, care, and oversight over the one as over the other, and as truly represents the business of the company in one state as in the other. In most, if not all, of the States directors are deemed proper officers on whom service of process against a corporation may be made. It is certainly so in New York. (Code Civ. Pro., secs. 431, 432.)

In *Hiller vs. R. R. Co.*, 70 N. Y., 223, the court says:

> "A director of a corporation is one of its principal 'officers and agents. He is charged with the duty 'of protecting and promoting its interests. It would 'be a clear case of malfeasance if process in a suit 'against a corporation was served upon him and he 'did not place it before the Board of Directors, or in 'the hands of the proper officers, so that the corpo-'ration would suffer no detriment. Hence service 'upon such an officer must within the general rule 'be sufficient. It can make no difference that this is 'the case of a foreign corporation. The statutes 'gives the Supreme Court jurisdiction of suits against 'such corporations and by what service that juris-'diction shall be acquired must within the general 'rule above be determined by the Legislature" (p. 228).

Also *Childs vs. Harris Mfg. Co.*, 104 N. Y. 477.

In *Insurance Co. vs. Woodworth*, 111 U. S., 146, it is declared to be the rule observed by the Federal Courts, that

"A corporation of one State doing business in 'another is suable in the courts of the United States 'established in the latter State if the laws of that 'State so provide, and in the manner provided by 'those laws."

To the same effect is *Amy vs. Watertown*, 130 U. S. 301, where it was held that in actions commenced in the United States Courts the mode of service of *mesne* process upon corporations will be governed by the law and practice of the State within whose limits this action was commenced. The Federal cases seem to hold that in actions in the State courts against foreign corporations, where the corporation is found within the State for the purposes of the suit, jurisdiction on it may be obtained by service of process upon an officer, director, or agent of the corporation, in the manner provided by the laws of the State, with the exception that if the laws authorize service on an agent it must be one who represents the corporation in the State.

The defendant has certainly shown no sufficient reason why the plaintiff should have been turned out of the Circuit Court into which this case has been removed, to pursue his remedy in the Pennsylvania courts at great inconvenience and expense to himself.

FOURTH.

For the several reasons pointed out herein, it is submitted that the question certified to this Court should be answered in the affirmative.

HEMAN W. MORRIS,
For Defendant in Error.

Supreme Court of the United States.

No. 182.—October Term, 1904.

The Pennsylvania Lumbermen's Mutual Fire Insurance Company, *vs.* Charles C. Meyer.	On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[April 3, 1905.]

Meyer, the plaintiff below, recovered judgment in the United States Circuit Court for the Western District of New York, against the corporation defendant, for five thousand and some odd dollars, upon policies of fire insurance issued by it upon certain buildings (and the machinery therein) in the city of Rochester, in the State of New York. The corporation sought to obtain a review of the judgment and to that end sued out a writ of error, and the case was brought before the Court of Appeals for the Second Circuit, which has certified certain facts upon which it desires the opinion of this court. These facts are as follows:

The action was commenced in the Supreme Court of the State of New York by service of the summons on Samuel H. Beach, at the city of Rome, N. Y., a director of the company, who resided in that city, and on application of the company, appearing specially, the case was removed into the United States Circuit Court for the Western District of New York, because of diverse citizenship of the parties. By motion, on special appearance, to set aside the service, by plea, exception and assignment of error, the question as to whether jurisdiction of the company had been obtained by such service has been properly raised.

The defendant in error is, and at the time of the commencement of this action was, a citizen and resident of the State of New York. The plaintiff in error is a fire insurance corporation organized under the laws of the State of Pennsylvania, and its office is in Philadelphia. Written applications were duly made to it for the issuance of the policies in suit, and were mailed from Rochester, N. Y., to the company at Philadelphia, Pennsylvania. The policies were made out and executed by it at Philadelphia and were sent to the insured at Rochester, N. Y., where he received the same. All transactions between the company and said insured, subsequent to the issuance of said policies and until after the destruction of said property by fire, were by correspondence, in writing, from Philadelphia to him at Rochester, and he writing from Rochester to it in Philadelphia.

Three of the said company's thirteen directors reside in the State of New York, but the only act done by them for it is to attend from time to time the meetings of the board of directors, which are held in the city of Philadelphia, and there to give such advice and take such action in connection with its business as may seem to them proper. They perform no duties and do no acts for the company in the State of New York and never have. The company has no agents or officers within that State and has not had at any time. It has no office within that State, has never been authorized or licensed by the insurance department thereof to do business therein, and has not taken the steps required by law for that purpose. At the date of the service of the summons, as aforesaid, the said company had and now has about nine hundred thousand dollars ($900,000) outstanding insurance on property within the State of New York, which is something less than one-third of its total risks. The applications therefor were made by mail, addressed to it at Philadelphia, and the policies were executed and issued at that city and sent by mail from there to the insured within the State of New York.

Ever since the plaintiff in error was incorporated it has been engaged in the business of insuring property located in the State of New York and other States against loss by fire, and has sent by mail circulars from Philadelphia into said State soliciting business. In the prosecution of its business and for the purpose of increasing it the company sends its general manager to the different conventions of lumbermen held in the State of New York, for the purpose of urging upon those attending upon such conventions the advantages of insuring with it. It sends its adjusters into the State of New York when a loss by fire occurs there to property insured by it, for the purpose of adjusting the amount of such loss. It originally placed insurance upon the property covered by the policies in question after its manager had pointed out the advantage of insuring in the company, the conversation being had at the city of Rochester, in that State.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

Upon the facts thus certified the Circuit Court of Appeals asks the question: "Had the Circuit Court jurisdiction of the plaintiff in error?"

In addition to the facts contained in the foregoing certificate the counsel for the respective parties stipulated upon the argument in this case before this court that a copy of one of the policies on which suit was brought in this case was correctly set out in the printed record in the Circuit Court of Appeals, and that this court might consider and decide the case with the same effect as if in the statement of facts accompanying the question certified by the Circuit Court of Appeals that court had found and certified the additional fact that the record in the Circuit Court of Appeals con-

tained a true copy of one of the policies, and that the others sued upon were in the same form and language as the one set out in that record.

The policies in suit were issued upon a two-story frame sawmill building, and additions, and also upon engines and boilers and other machinery placed in that building, situated on Monroe avenue in the city of Rochester, State of New York. The policies provide that the company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and that such loss or damage is to be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; the assessment or estimate is to be made by the insured and the company; if they differ as to the amount of loss, the same is to be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, and the two so chosen are to select a competent and disinterested umpire; the appraisers together are to estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, they are to submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss. After the amount of the loss or damage has been thus determined, the sum for which the company is liable is payable in sixty days. It is optional with the company to repair, rebuild or replace the property lost or damaged, with other of like kind and quality, within a reasonable time as provided for in the policy.

In order that a Federal court may obtain jurisdiction over a foreign corporation the corporation must, among other things, be doing business within the State. (*St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 Id. 518; *Barrow Steamship Company* v. *Kane*, 170 Id. 100; *Connecticut Mutual Life Insurance Company* v. *Spratley*, 172 Id. 602.)

To obtain jurisdiction of a foreign corporation under the Code of New York, personal service of the summons upon and a delivery to the defendant must be made in the manner designated by section 432 of the Code of Civil Procedure of that State. Subdivision (1) of that section provides for the service of the summons on and its delivery to the president, treasurer or secretary; subdivision (2) provides for like service upon and delivery to a person designated for the purpose by the corporation. The service was made in this case under subdivision (3) of that section, which reads as follows:

(3) "If such a designation is not in force, or if neither the person designated nor an officer specified in subdivision first of this section can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director or a managing agent of the corporation within the State."

It does not appear that the company had any property within the State, and therefore in order to come within subdivision (3) of the section the cause of action must have arisen therein and the summons must have been served within the State upon one of the officers named in that subdivision, viz., the cashier, a director or a managing agent of the corporation.

(1) Was the company doing business in New York State? Nearly one-third of the amount of its total fire risks was in that State when these policies were issued and when the loss occurred. If it be conceded that the contract was made in Philadelphia, it does not follow that all its business was therefore done in the State of Pennsylvania. The contract was an insurance policy issued upon real estate and machinery in a building situated in the city of Rochester, in New York. The contract was to pay the amount of loss, which might be sustained by fire, as specified in the policy. The policy provides for the manner of determining the amount of this loss, either by agreement between the company and the owner, or, in case of disagreement, then by the appraisers as already stated. The provisions of the contract clearly contemplate the presence of an agent of the company at the place of the loss after it has occurred, for the purpose of determining its extent and adjusting, if possible, the amount payable by the company to the owner. If no such adjustment can be made the policy provides in terms for the appointment of appraisers, one by the company and one by the owner, and that they disagreeing, an umpire shall be appointed, and the agreement of any two shall be binding. After that, the loss is payable to the owner by the company within sixty days. As the policy insures against loss, it of course contemplates that such loss may occur; and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated. When, under the terms of the contract, the company sends its agent into the State where the property was insured and where the loss occurred, for the purpose of adjustment, it would seem plain that it was then doing the business contemplated by its contract, within the State. A fire insurance company which issues its policies upon real estate and personal property situated in another State is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies as it is when engaged in making contracts to take such risks. If not doing business, in such case, what is it doing? It is doing the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract and in order to carry out its provisions, and it could not properly be carried out without this act being done; and the contract itself is the very kind of contract which constituted the legal business of the company, and for the purpose of doing which it was incorporated. This is not a sporadic case, nor the contracts in suit the only

ones of their kind issued upon property within the State of New York. Many contracts of the nature of the one in suit were entered into by the company covering property within the State. We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into that State to perform the various acts of adjustment provided for by its contracts and made necessary to carry them out.

We have no difficulty in concluding that the defendant was doing business in the State of New York during all the time of the existence of these policies.

(2) Did the cause of action arise within that State? Although the contract may have been a Pennsylvania contract, yet it does not follow that all its provisions were to be carried out in that State. The policy of insurance was, as we have said, upon real estate within the State of New York, and upon machinery contained in the buildings insured. After the defendant and the owner had either agreed upon the amount of loss, or the same had been estimated and determined upon by the appraisers, as provided for in the policy, the defendant, by the terms of that instrument, promised to pay to the owner the amount thus arrived at, within sixty days. The policy does not state in so many words where such payment is to be made, but it is a general rule that, in the absence of any such provision, or of any language from which a different inference may be inferred, the right of the creditor to demand payment at his own domicil exists, and it is the duty of the debtor to pay his debt to the creditor in that way. It is stated in the opinion of this court, by Mr. Justice Field, in *State Tax on Foreign-held Bonds*, (15 Wall. 300, 320): "All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. The principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement." It is stated in 2 Parsons on Contracts, 8th edition, 702, as follows: "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payments; the rule being that debts as such have no "*locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." See also *Chicago &c. Railway* v. *Sturm*, (174 U. S. 710.) In *Hale* v. *Patton*, (60 N. Y. 233, 236,) Andrews, J., in delivering the opinion of the court, said: "In general a debtor, who is indebted on a money obligation, is bound, if no place of payment is specified in the contract, to seek the creditor and make pay-

ment to him personally. But this rule is subject to the exception that if the creditor is out of the State when payment is to be made, the debtor is not obliged to follow him, but readiness to pay within the State in that case will be as effectual as actual payment to save a forfeiture. (Co. Litt. 304, 2; *Smith* v. *Smith*, 25 Wend. 405; *Allshouse* v. *Ramsey*, 6 Whart. 331; *Southworth* v. *Smith*, 7 Cush. 391; *Tasker* v. *Bartlett*, 5 Id. 359.)" And the same views in *Dockman* v. *Smith*, (113 Mass. 330.) The exception as to the creditor being out of the State, spoken of by Judge Andrews, refers to the subsequent absence of the creditor from the State, which was his domicil when the contract was there made.

In some other of the cases above cited, it is is said the debtor need not follow the creditor out of the State where the contract was made in order to pay or make tender of payment of the debt. That depends upon the contract and what inference of the place of payment may be drawn from its contents when it does not state in so many words where payment is to be made. Where the debtor is a fire insurance company and makes such a contract as the policies in suit, and it is engaged in doing business by insuring property outside the State of its creation, and makes provision such as is made in this case for payment or for rebuilding or repairing, we think the place of payment in contemplation of the parties, and to be inferred from the facts set forth, is at the domicil of the creditor in the State where the property insured was situated.

Instead of making payment for the loss sustained by fire, the defendant had the option of repairing or rebuilding. If it availed itself of that right, of course it would have to rebuild at the place where the loss occurred. So far as appears from the statement of facts, the defendant has failed to make payment, and has also failed to avail itself of its option to rebuild. The payment, we think, was to be made at the same place where the rebuilding was to be done, in case the defendant availed itself of its right to rebuild, that is, within the State of New York, where the loss occurred. Failing to make payment, or failing to build or repair, it failed to comply with the terms of its contract, and out of that failure the cause of action arose in the State of New York.

(3) We think the service of the summons within the State of New York upon a director residing in that State was, under the facts of this case, a good service. As is seen, the company was doing business within the State and the cause of action arose therein, and in such a case service upon a director residing in the State was sufficient. There is nothing in the cases of *Conley* v. *Mathieson Alkali Works*, (190 U. S. 406,) and *Geer* v. *Same Defendant*, (Id. 428,) to the contrary. The first of the above cited cases seems rather to assume that if the company were doing business in the State, the service on a resident director would have been good. Although it is stated in the

case at bar that the duties of a director of this defendant were to be performed at Philadelphia, where the board of directors met, yet that fact is not material in this case. A foreign fire insurance corporation doing business within another State, and voluntarily electing a part of its directors from among those who are residents of such State, may be said from that very fact to add to the confidence of possible insurers with the company in that State, and in that way to secure more business therein than would otherwise be the case. Although doing no particular act in the State for this company, such directors are, nevertheless, members of and policyholders therein, and are a part of the governing body of the company, and are by their position so far representative thereof as, in our judgment, to render service of process upon them in the State of their residence, when the company is doing business therein, a good service upon the company itself. Service upon them it may be assumed would certainly result in notice to the company itself, which is at least one of the reasons for holding a service on an agent good.

It would be most unwise to hold, upon the facts herein stated, that a person who suffered loss under a policy of insurance could only obtain redress, when refused by the company, in the courts of the State where the company was incorporated. It is not unreasonable for the State, under such facts, to endeavor to secure to its citizens a remedy in the domestic forum upon this very important class of contracts. (*Lafayette Insurance Co.* v. *French*, 18 How. 404, 407.) And we have no doubt that if it were generally understood by policyholders in States other than the State where the company was created that resort for the enforcement of their rights must in all cases be had to the courts of the State of the creation of the company, even though the company did business in such other States, the number of policyholders in the other States would seriously fall off.

The service of the summons was, in our judgment, a good service on the company, and we therefore answer the question of the Circuit Court of Appeals in the affirmative; and it is

So ordered.

Mr. Justice HARLAN took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.